(26,902)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 816.

COMMERCIAL PACIFIC CABLE COMPANY, APPELLANT,

vs.

ALBERT S. BURLESON AND NEWCOMB CARLTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 24, 1919.

1 *Equity Subpœna.*

The President of the United States of America to Albert S. Burleson, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Commercial Pacific Cable Company, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 9th day of December, in the year one thousand nine hundred and eighteen and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR., *Clerk.*

WILLIAM W. COOK,
Plaintiff's Solr.

The defendant is required to file his answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

2 I hereby certify, that after due and diligent search I am unable to find the within named defendant Albert S. Burleson in the Southern District of New York.

Dated N. Y., Dec. 30, 1918.

THOMAS D. McCARTHY,
U. S. Marshal, So. Dist. of N. Y.

U. S. District Court, S. D. of N. Y., Filed Dec. 30, 1918.

3 In the District Court of the United States, Southern District of New York.

COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON, Defendant.

Bill of Complaint.

To the Judges of the District Court of the United States, Southern District of New York:

The Commercial Pacific Cable Company, a citizen and resident of the City, County and State of New York, brings this, its bill of complaint, against Albert S. Burleson, a citizen of the State of Texas and a resident of the District of Columbia.

And thereupon your orator complains and says: That during all the times hereinafter mentioned it has been and still is a corporation duly organized under the laws of the State of New York and has its principal place of business in the City of New York, in the Southern District of New York, and is a resident therein, and is engaged among other things in the ownership, maintenance and operation of a system of submarine cables in the Pacific Ocean extending from San Francisco, California, to China, Japan, and the Philippine Islands, and said system is ten thousand and ten miles in length. That for many years last past your orator has been and still is operating said
4 system in the transmission of cablegrams, and that the same constitutes interstate and international commerce, and your orator further says that it also transmits messages for the Government of the United States at one-half of the regular public rate therefor.

That on or about the 16th day of July, 1918, the Congress of the United States by Joint Resolution of the Senate and House of Representatives passed a resolution authorizing and empowering the President during the continuance of the present war whenever he should deem it necessary for the national security or defense to supervise or take possession and assume control of telegraph, telephone, marine cable or radio system or systems or any part thereof and operate the same for the duration of the war but not beyond the date of the proclamation by the President of the United States of the exchange of ratifications of the Treaty of Peace. That a copy of the aforesaid Joint Resolution of the Congress, is attached hereto
5 and made a part hereof and marked Exhibit "A."

That on or about the 11th day of November, 1918, an armistice was signed suspending hostilities of the present war, and thereupon immediately the duration of the war ceased within the letter, purpose and spirit of said Joint Resolution, so far as said Joint Resolution purported to authorize the taking of possession and control of the systems therein described. That on November 11, 1918, the President officially addressed the two Houses of the Congress in

joint session, and formally and officially announced the termination of the war. That in such address the President, after stating the terms of the armistice, said:

"The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it."

That the defendant is, and during all the times hereinafter mentioned has been Postmaster-General of the United States. That on or about the 16th day of November, 1918, the defendant, assuming to act as Postmaster-General, announced informally through the public press that he had taken possession and assumed control of all marine cable system or systems owned or operated by any and all American corporations, including not only your orator's cables hereinbefore specified, but also including the cables of the Commercial Cable Company, in the Atlantic Ocean, and alos including the two cables of the Central and South American Telegraph Company from New York City to and through the Isthmus of Panama and thence down the western coast of South Amerita and across the mountains to the Argentine Republic, and including also six British owned cables leased to the Western Union Telegraph Company, and two American owned cables leased to that company, and including also cables from the
6 United States to Cuba and from the United States to Mexico.

That his action was based on a proclamation of the President of the United States dated November 2nd, 1918, (the actual date of execution being unknown to your orator, but your orator alleges upon information and belief that it was subsequent to November 11th, 1918,) a copy of which is attached hereto and made a part hereof and marked Exhibit "B." That on or about the 16th day of November defendant issued an order, without date, assuming to take control of said cable system, a copy of which is attached hereto and is made a part hereof and is marked Exhibit "C." That the defendant claims to have taken possession and assumed control of your orator's aforesaid cable system and to be now operating the same, and claims to be entitled to the income of your orator's said cable system, which is more than ten thousand dollars a day.

That the said seizure or attempted seizure of your orator's said cable system is unconstitutional, unauthorized, ultra vires, illegal and void, for the reasons that the war within the meaning of said Resolution had terminated prior to the time of said seizure and the alleged authorization thereof; that the Congress had no power or authority under the Constitution to authorize the taking possession and control and operation of said cable system under the circumstances existing at the time of said seizure; and that said seizure was not reasonably necessary for the national security or defense; and that said seizure deprived your orator of its property without due process of law; and that said seizure took your orator's private property for public use without just compensation to your orator; and that said seizure was an unreasonable and arbitrary seizure; and that said seizure was not for public use; and that defendant is not an impartial tribunal to determine your orator's compensation for the use of said marine cables; and that proper and legal provision has not been made for

7 the payment to your orator of said compensation, not even for the keeping by your orator of the regular profits of its own property.

That the recent war referred to in said joint resolution, is no longer in continuance, it having been terminated beyond possibility of renewal on November 11, 1918, by an armistice. That said Proclamation dated November 2nd, 1918, did not become a proclamation and was not proclaimed or announced, signed, countersigned, made public or effective until after November 11th, 1918, namely, about November 16th, 1918, and that no seizure or possession of said cables was attempted, claimed or made until on or about November 16th, 1918.

That it is not necessary for the national security or defense that your orator's system of marine cables shall be seized, or taken possession of, or assumed control of by the defendant or anyone else. That the national security or defense will not be furthered in the slightest degree by defendant taking possession and assuming control of your orator's marine cables. That the national security or defense was fully attained by the signing of said armistice and by the discontinuance of hostilities under the said present war. That a full, adequate, complete, quick and correct cable service has been during the period of the war and still is being given by your orator on its cable system to the Government of the United States and that all government messages are given precedence over all other messages, and that there has been no complaint or occasion for complaint on the part of the Government in regard to the quick and accurate
8 transmission of its messages, and that your orator's cables are worked and operated to their utmost capacity by a most competent staff of officers and cable operators, and that said service could not be increased or bettered, and that the operation of said cable lines by or under the control of the defendant would be less efficient and satisfactory not only to the Government in the transmission of its cablegrams, but to the public in the transmission of public messages generally and that the seizure of said cables on the ground that they were or are necessary for the national security or defence was and is a mere pretext without substance or basis of fact whatsoever.

That ever since the United States entered the present war the American ends of said marine cables of your orator have been and still are under the absolute control of the officials of the United States Government and particularly the control of the Director of Naval Communications, and that nothing has been done by your orator relative to the operation of said cable lines without the knowledge and approval of said Director of Naval Communications. That every request and even suggestion made at any time by said Director of Naval Communications or his representatives, has been promptly complied with and carried out in every particular. That a most rigid censorship was established by the United States Government over your orator's cables, and that your orator has heartily cooperated in said censorship. That all the demands and even requests of the Government on your orator in behalf of the national security and defense have been promptly, fully and cheerfully complied with by your orator.

That the claim that free communication in the transmission of cablegrams between America and Europe during the next few months in connection with peace negotiations justifies the seizure of cables as aforesaid did not and does not necessitate or justify the seizure of your orator's said cable from San Francisco to China, Japan and
9 the Philippines, nor the seizing of two cables from New York to Panama; thence down the west coast of South America; thence over the mountains to the Argentine Republic (as has been done); nor the seizing of cables to Cuba and Mexico (as has been done); nor the seizing of thirteen cables across the Atlantic (as has been done). That your orator's cable from San Francisco to China, Japan and the Philippine Islands has been and is devoted first to the transmission of Government messages of all kinds, and then to press messages and commercial messages, and that the seizure by the Government of your orator's cable does not facilitate or better in the slightest degree the transmission of government messages or any other messages, your orator's cable being already worked to its utmost capacity by its expert officers and staff. That your orator is working its cable for the Government and the public as fully and efficiently as it possibly could be worked, if actually owned and operated by the Government itself for governmental purposes. That your orator was not consulted as to the necessity or even advisa-
bility of said seizure of said cable, although your orator could
10 have given more competent expert advice on that subject than anyone else conversant with cable affairs.

That said joint resolution of Congress and all acts of defendant thereunder are unconstitutional, illegal and void, in that the compensation therein provided for is not to be determined by an impartial jury or commission, but under the authority given to the President is intended to be, and will be, determined by the defendant and that the authority conferred upon the President under said Resolution is exercised and will be exercised through the defendant. That in the case of the Postal Telegraph-Cable Company the system of which was heretofore seized under said Resolution, the fixing of the compensation therefor was committed to the defendant; that the determination of your orator's compensation will thus be left to the arbitrary caprice and prejudiced mind of defendant, who is interested personally and officially in giving an unfair and unreasonably low, insufficient and inadequate compensation to your orator, because the less he gives your orator the more he keeps for the Government to its profit at your orator's expense and to the personal renown of defendant. That for many years last past the defendant as Postmaster-General has advocated government ownership of telegraphs and cables and that defendant is not an impartial tribunal to determine the compensation, operation, and policy of your orator in regard to its said system of marine cables.

That your orator's right to appeal to the Court of Claims is an illusory right, in that no provision has been made for paying any judgment that your orator may obtain in that court. That no adequate or safe fund has been provided from which your orator may at some future time be compensated for the seizure and use of its

said submarine cables, and that the only recourse for your orator to collect any judgment given by the Court of Claims will be an application to the Congress to appropriate the money therefor, which application may be disregarded absolutely, and thereupon
11 your orator would receive no compensation whatsoever. That the seizure of your orator's marine cables is not the seizure merely of physical property or of the use thereof exclusively for governmental purposes as distinguished from commercial purposes, but is a seizure of the same with all future income therefrom so long as the seizure continues, thereby seizing the monies, income and profits of your orator in addition to the physical property itself, and thereby depriving your orator of such monies, income and profits and jeopardizing your orator's payment of interest and dividends in case the defendant should exercise his discretion to withhold the same as he has power under said Joint Resolution so to do, and that your orator's only recourse to repossess and obtain such monies, income and profits would be a suit in the Court of Claims without any certainty or reasonable expectation that a judgment therefor would be paid within a certain time, if, in fact, paid at all, and that this constitutes an unreasonable seizure, and the taking of private property for public use without just compensation, and deprives your orator of its property without due process of law, in violation of the Constitution of the United States. That there is no compulsory process by which a judgment of the Court of Claims can be collected and that it is entirely voluntary with the Congress whether any such judgment shall be paid or not, and that on September 21st, 1907, one of your orator's cables was disrupted by one of the warships of the United States and your orator presented a claim for damages in the Court of Claims and obtained a judgment on June 2nd ,1913, for $35,894.47, subsequently reduced to $35,838.22 and that although the Congress has been repeatedly requested to pay said claim it never has done so and the same is still unpaid and there are no means of enforcing payment. That defendant claims that he is entitled to take all of your orator's daily profits and return a small portion thereof to your
12 orator and keep the remainder in violation of the decisions of the Supreme Court of the United States and of the Constitution of the United States. That this is confiscatory, communistic and in violation of established principles of law. That recently the Postal Telegraph system, with which your orator connects and is intimately associated, had its land telegraph lines seized by defendant and although that system in the year 1917 made a profit of $4,269,547.61, the defendant awarded that system only $1,680,000 as compensation, being 6% on $28,000,000, which defendant's committee said was the physical value of the system's plant. That defendant through a committee proceeds on a fundamentally wrong principle in determining compensation, namely, 6% on an arbitrarily fixed physical value of the plant without any allowance for earning power and without any correct method even of arriving at said appraised value. That all this is the taking of property without due process of law and without proper compensation being made or provided for.

That the power to fix the compensation to be paid your orator has been illegally delegated.

That all of said cable systems, including your orator's, have landings on the territories of foreign nations, and upon information and belief that the consent of said nations to the United States Government seizing said system of cables, including said landings, has not been obtained, and that this constitutes a violation of the principle of international law that one nation shall not encroach upon or seize any part of the territory of another nation, and that all nations are very properly jealous of landings on their soil of cables controlled or owned by other nations and forbid it because it is liable to lead to international complications, and that even if the defendant should
13 hereafter obtain the consent of said foreign nations to the seizure of said cables and landings on terms and conditions satisfactory to them, such terms and conditions, pertaining as they would to the occupation by the Government of foreign territory, would constitute the substance of a treaty which under the Constitution of the United States can be made only by and with the advice and consent of the Senate, which advice and consent has not been obtained, and that this is a violation of the Constitution of the United States. That all this jeopardizes your orator's cables, cable landings and relations with foreign governments, the disruption of which would work irreparable injury to your orator.

That your orator's said marine cable is private property and has been taken by defendant not for public use, and that this is in violation of the Constitution of the United States and that there is no necessity for the exercise of the power of the Government in taking the said marine cable, and that no provision has been made for any judicial inquiry as to the necessity for the seizure and taking of said marine cable, and that said seizure is arbitrary, all in violation of the Constitution of the United States, guaranteeing due process of law. That this suit in equity is brought to enforce a claim to real or personal property within the Southern District of New York.

That the continued interference of the defendant with the business of your orator as aforesaid is causing and likely to cause great money damage to your orator which will largely exceed the sum of three thousand dollars exclusive of interest and costs.

That the defendant in carrying out his unlawful possession and control of your orator's marine cable system and business will use the military power of the United States, against which as a matter of course your orator has no adequate means of resistance, and that great and irreparable injury is being done to your orator, its property and business, and the cable communication of the public.

Wherefore your orator prays that the defendant, his officers and agents, may answer the premises according to law, (answer under oath being hereby waived), and that he may, by a writ of injunction to be issued out of and under the seal of this Honorable Court, be enjoined from carrying out his claim that he has taken possession and assumed control of your orator's said marine cable system, and that the defendant, his officers and agents, may be enjoined from interfering with your orator's property or business aforesaid or

14 from taking any steps or making any demands on your orator in connection therewith.

And your orator prays that pending the determination of this suit, this Court will grant and issue a temporary injunction or restraining order, forbidding all of said actions on the part of the defendant as to which a final injunction *as* hereinbefore prayed, in order to preserve your orator from great injury to its business and to prevent the injury that would occur to the public interest by reason of the threatened acts as aforesaid while this suit is pending.

And your orator further prays that it may have such other and further relief in the premises as the nature of the circumstances of the cause may require and to your Honors may seem meet.

Your orator prays that process of subpœna against the defendant, may be issued out of and under the seal of this Honorable Court, commanding him, to appear and make answer, plead or demur to your orator's bill of complaint at a day to be named therein and under certain penalty to be therein expressed.

WILLIAM W. COOK,
Solicitor of Complainant.

CHARLES E. HUGHES,
Of Counsel with Complainant.

15 STATE OF NEW YORK,
City and County of New York, ss:

Clarence H. Mackay, being duly sworn, deposes and says: That he is the President of the Commercial Pacific Cable Company, the complainant in the above entitled suit in equity; That he has read the foregoing Bill of Complaint; that the statements therein contained are true to the best of his knowledge and belief and so far as made of his own knowledge they are true and so far as they are made from information derived from others he believes them to be true.

CLARENCE H. MACKAY.

Subscribed and sworn to before me this ninth day of December 1918.

[L. S.] THOMAS G. BARKER,
Notary Public, Kings County, No. 419.

Certificate filed in N. Y. Co. No. 529.
My commission expires March 30, 1919.

16 EXHIBIT A.

(Public Resolution—No. 38—65th Congress.)

(H. J. Res. 309.)

Joint Resolution To authorize the President, in time of war, t supervise or take possession and assume control of any telegraph

telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, That nothing in
17 this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

Approved, July 16, 1918.

18

EXHIBIT B.

By the President of the United States of America.

A Proclamation.

Whereas, the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

That the President, during the continuance of the present war, is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in

such manner as may be needful or desirable for the duration of t
war, which supervision, possession, control, or operation shall not e
tend beyond the date of the proclamation by the President of t
exchange of ratifications of the treaty of peace: Provided, That ju
compensation shall be made for such supervision, possession, contr
or operation, to be determined by the President; and if the amou
thereof, so determined by the President, is unsatisfactory to the p
son entitled to receive the same, such person shall be paid 75 p
cent. of the amount so determined by the President and shall be e
titled to sue the United States to recover such further sum as, add
to said 75 per cent., will make up such amount as will be just co
pensation therefor, in the manner provided for by section 24, pa
graph 20, and section 145 of the Judicial Code: Provided furth
That nothing in this act shall be construed to amend, repeal, impa
or affect existing laws or powers of the several States in relation
taxation or the lawful police regulations of the several States, exc
wherein such laws, powers, or regulations may affect the transm
sion of Government communications, or the issue of stocks and bo
by such system or systems.

19 And whereas, it is deemed necessary for the national
curity and defense to supervise and to take possession a
assume control of all marine cable systems and to operate the sa
in such manner as may be needful or desirable.

Now, therefore, I, Woodrow Wilson, President of the United Stat
under and by virtue of the powers vested in me by the foregoi
resolution, and by virtue of all other powers thereto me enabling,
hereby take possession and assume control and supervision of ea
and every marine cable system and every part thereof owned or co
trolled and operated by any company or companies organized a
existing under the laws of the United States or any State thereof,
cluding all equipment thereof and appurtenances thereto, wh
soever, and all material and supplies.

It is hereby directed that the supervision, possession, control a
operation of such marine cable systems hereby by me undertak
shall be exercised by and through the Postmaster-General, Albert
Burleson. Said Postmaster-General may perform the duties here
and hereunder imposed upon him, so long and to such extent a
in such manner as he shall determine, through the owners, manage
board of directors, receivers, officers and employees, of said mar
cable systems.

Until and except so far as said Postmaster-General shall from ti
to time, by general or special orders otherwise provide, the own
managers, board of directors, receivers, officers, and employees of
various marine cable systems shall continue the operation thereof
the usual and ordinary course of the business of said systems, in
names of their respective companies, associations, organizations, o
ers, or managers, as the case may be.

Regular dividends hitherto declared and maturing, interest u
bonds, debentures, and other obligations, may be paid in due cou
and such regular dividends and interest may continue to be p

until and unless the said Postmaster-General shall from time
20 to time otherwise by general or special orders determine; and, subject to the approval of said Postmaster-General, the various marine cable systems may determine upon and arrange for the renewal and extension of maturing obligations.

From and after 12 o'clock midnight on the 2d day of November, 1918, all marine cable systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster-General without further act or notice.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President in the District of Columbia, this 2d day of November, in the year of our Lord one thousand nine hundred and eighteen and of the independence of the United States the one hundred and forty-third.

[SEAL.] WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State.

21 EXHIBIT C.

Bulletin No. 14.

Order No. 2351.

Pursuant to the proclamation by the President of the United States dated the second day of November, nineteen hundred and eighteen, I have assumed possession, control and supervision of the marine cable systems of the United States. This proclamation has already been published and the officers and operating officials of the cable companies are acquainted with its terms.

Until further notice the marine cable companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster-General. All officers, operators and employees of the marine cable companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service, he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public.

I earnestly request the loyal cooperation of all officers, operators and employees and the public, in order that the service rendered shall not only be maintained at a high standard, but improve wherever

possible. It is the purpose to coordinate and unify these services so that they may be operated as a national system with due regard to the interests of the public and the owners of the properties.

22 No changes will be made until after the most careful consideration of all the facts. When deemed advisable to make changes, due announcement will be made.

Nothing contained in this order shall be construed to affect in any way the censorship of marine cables now conducted under the direction of the Secretary of the Navy under Executive Order of September 26, 1918.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Dec. 9 1918.

23 In the District Court of the United States, Southern District of New York.

COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

Amendment of Bill of Complaint.

To the Judges of the District Court of the United States, Southern District of New York:

Comes now the complainant above named and amends its Bill of Complaint by adding the said Newcomb Carlton as a defendant thereto and wherever in the body of the Bill the word "defendant" occurs there shall be added thereto in each instance the word "Burleson."

Immediately before the prayer for relief insert the following allegation:

That the above named defendant Newcomb Carlton represents said defendant Burleson, and as such representative on the 13th day of December, 1918, made a personal demand upon your orator that your orator turn over to him, said defendant Newcomb Carlton, the possession and control of your orator's said cable lines, and that thereupon your orator being unable to resist the force which the defendants had it in their power to use, was obliged to and did turn over to defendants under protest and without waiving any legal rights or objections thereto said cable lines.

That a copy of the order of the defendant Burleson, authorizing said seizure by the defendant Carlton is attached hereto and marked Exhibit "D" and is hereby made a part hereof.

That defendant Burleson and defendant Carlton are and each of them is illegally withholding your orator's property from your orator's possession and lawful control, and that said defendants are and each of them is in illegal possession of the same to the irreparable injury of your orator and are refusing to recognize your orator

right to the possession and enjoyment thereof. That the defendant Carlton has accepted, adopted and become a party to and participant in all of the unconstitutional unauthorized, ultra vires, illegal and void acts aforesaid of the defendant Burleson and is accountable and responsible therefor, and threatens and intends to carry out the same and is now proceeding to carry out the same to the irreparable injury of your orator. That this suit is of a civil nature in equity and arises under the Constitution or laws of the United States.

That the prayer for relief is as follows (in lieu of the prayer as it appears in the Bill):

Wherefore, your orator prays that the defendant Burleson, his officers and agents, and the defendant Carlton, may answer the premises according to law (answer under oath being hereby waived), and that they may, by a writ of injunction to be issued out of and under the seal of this Honorable Court, be enjoined from carrying out their claim that they have legally taken possession and assumed control of your orator's said marine cable system, and that
24 the defendant Burleson, his officers and agents, and the defendant Carlton, may be enjoined from interfering with your orator's property or business aforesaid or from taking any steps or making any demands on your orator in connection therewith, and that the defendants by mandatory injunction be required to return to your orator the possession and control of said cable lines, property and business so far as they have seized the same.

And your Orator prays that pending the determination of this suit, this Court will grant and issue a temporary injunction or restraining order, forbidding all of said actions on the part of the defendants as to which a final injunction is hereinbefore prayed, in order to preserve your orator from great injury to its business and to prevent the injury that would occur to the public interest by reason of the threatened acts aforesaid while this suit is pending.

And your orator further prays that it may have such other and further relief in the premises as the nature of the circumstances of the cause may require and to your Honors may seem meet.

Your orator prays that process of subpœna against the defendants, may be issued out of and under the seal of this Honorable Court, commanding them to appear and make answer, plead or demur to your orator's bill of complaint at a day to be named therein and under certain penalty to be therein expressed.

WILLIAM W. COOK,
Solicitor of Complainant.

CHARLES E. HUGHES,
Of Counsel with Complainant.

STATE OF NEW YORK,
City and County of New York, ss:

Clarence H. Mackay, being duly sworn, deposes and says: That he is the President of The Commercial Pacific Cable Company, the complainant in the above entitled suit in equity; that he has read the

foregoing amendments to the Bill of Complaint; that th
25 statements contained therein are true to the best of his know
edge and belief and so far as made of his own knowledg
they are true and so far as they are made from information derive
from others he believes them to be true.

CLARENCE H. MACKAY.

Subscribed and sworn to before me this 16th day of Decembe
1918.

[L. S.] THOMAS G. BARKER,
Notary Public, Kings County, No. 419.

Certificate filed in N. Y. Co. No. 529.
My commission expires March 30, 1919.

26 EXHIBIT "D."

Order No. 2474.

December 12, 1918.

Whereas the Congress of the United States in the exercise of th
Constitutional authority vested in them, by Joint Resolution of th
Senate and House of Representatives bearing date of July 16, 191
resolved: that the President during the continuance of the present wa
is authorized and empowered, whenever he shall deem it necessary fo
the national security or defense, to supervise, take possession, and a
sume control of any telegraph-telephone, marine cable, or radio sy
tem or systems, or any part thereof, and to operate the same in suc
manner as may be needful or desirable for the duration of the wa
which supervision, possession, control or operation shall not exten
beyond the date of the proclamation of the exchange of ratificatio
of the treaty of peace, and

Whereas the President of the United States, by his proclamation
the 2nd day of November, 1918, declared that he deemed it necessar
for the national security and defense to supervise and take possessio
and assume control of all marine cable systems and to operate th
same in such manner as may be needful or desirable, and did, by sai
proclamation under and by virtue of the powers vested in him by sai
resolution and by virtue of all other powers thereto him enablin
take possession and assume control and supervision of each and ever
marine cable system and every part thereof owned or controlled an
operated by any company or companies organized and existin
27 under the laws of the United States or any State thereof, i
cluding all equipment and appurtenances thereto whatsoev
and all the material and supplies, and did also by said proclamatio
direct that such supervision, possession, control and operation of sa
marine cable systems by him undertaken be exercised by a
through the Postmaster General, Albert S. Burleson, which sa
proclamation further directed that until and except so far as the Po
master General shall from time to time by general or special orde
otherwise provide, the owners, managers, boards of directors,

ceivers, officers and employees of the various marine cable systems shall continue the operation thereof in the usual and ordinary course of business of said systems in the names of their respective companies, associations, organizations, owners or managers, as the case may be, and that from and after 12:00 o'clock midnight on the 2nd day of November 1918, all of the marine cable systems included in said proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice;

And whereas by Order No. 2351 of the Postmaster General, dated November 18, 1918, it was directed that all of the officers, operators and employees of the marine cable companies continue in the performance of their existing duties, reporting to the same officers as theretofore, and on the same terms of employment, in which order it was announced to be the purpose to co-ordinate and unify these services so that they might be operated as a national system with due regard to the interests of the public and the owners of the properties;

28 And whereas by letter of the Postmaster General, dated December 4, 1918, addressed to Mr. Clarence H. Mackay, President of the Commercial Cable Company, copies of which were transmitted to Mr. George G. Ward, Vice President of the Commercial Cable Company, and to Mr. Newcomb Carlton, President of the Western Union Telegraph Company, it was declared that the interest of the public service during the present emergency necessitated the unification in operation to the fullest extent possible of the cable systems leading from this country to Europe so that the full capacity of all the cables might be available to the public and the press which it was manifest could only be accomplished through the operation of the two systems under one management, and that after having made a survey of the situation and becoming satisfied that the object sought could best be accomplished by placing the cables under the operating head of the Commercial Cable Company, it was directed that Mr. George G. Ward, Vice President of the Commercial Cable Company, assume the management and operation of both the Commercial Cable System and the cable systems operated by the Western Union Telegraph Company;

And whereas in his letter of December 6, 1918, said Newcomb Carlton not only acquiesced for his companies in the aforesaid directions for unification in operation of the two cable systems under said George G. Ward, the operating head of the Commercial Cable Company, but pledged his hearty co-operation therein, stating his judgment to be that such unification would result in an increase in the total daily capacity of the cables comprising the two systems, and also in important economies in operation;

29 And whereas in his letter of December 11, 1918, Mr. Clarence H. Mackay, President of the Commercial Cable Company, advised the Postmaster General that said George G. Ward has taken no step to unify the properties by taking possession of the cables controlled by the Western Union Telegraph Company, and has no intention of doing so;

And whereas in his said letter of December 11, 1918, the said Clarence H. Mackay, President of the Commercial Cable Company, has shown the hostility of the officials of the said company to any plan of unification of operation of the cable systems, and said Ward has declined to comply with said instructions of the Postmaster General of December 4, 1918, and

Whereas, the public interests require that the operation of the said cable systems be unified not only for improvement of service but also that important economies in operation may be effected during the period of Government control which can be accomplished only by placing such unified operations under the management of persons in complete accord with the ends desired,

Now, therefore, it is ordered and directed that so much of the said Order No. 2351 as directs all of the officers, operators and employees of the marine cable companies to continue in the performance of their present duties, is modified so as to exclude Clarence H. Mackay, George G. Ward and William W. Cook from any connection with the supervision, possession, control or operation of any and all marine cable systems or any part thereof the supervision, possession, control and operation of which was taken over and assumed by the President in his said proclamation of November 2, 1918, and said Newcomb Carlton is hereby directed to assume the management and operation of each and all of the marine cable systems, the supervision, possession, control and operation of which was taken over and assumed by the President and by him directed to be exercised by and through the Postmaster General so far and to such extent as is authorized by the said Joint Resolution of Congress and the said proclamation of the President. The said Carlton will proceed at once to the execution of this Order and shall carry into effect directions which have been given for the unification of the operation of said cable systems and such other directions hereafter to be issued.

(Signed) A. S. BURLESON,
[SEAL.] *Postmaster General.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Dec. 16, 1918.

Equity Subpœna.

The President of the United States of America to Newcomb Carlton, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer an amended bill of complaint exhibited against you and Albert S. Burleson in the said Court in a suit in Equity, by Commercial Pacific Cable Company and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 16th day of December, in the year one thousand

nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR., *Clerk.*

WILLIAM W. COOK,
Plaintiff's Solr.

The defendant is required to file an answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

32 I hereby certify, That on the 16th day of December, 1918, at the City of New York, in my District, I personally served the within Subpœna in Equity upon the within-named Defendant Newcomb Carlton, at No. 195 Broadway, New York City, N. Y., by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal, Southern District of New York.

Dated December 17, 1918.

U. S. District Court, S. D. of N. Y. Filed Dec. 17, 1918.

33 United States District Court, Southern District of New York.

In Equity.

Docket No. E 15/331.

THE COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

vs.

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

SIR: you will please take notice that the undersigned will bring the annexed motion on for hearing at a stated term of this Court for the hearing of motions appointed to be held at the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 27th day of December, 1918, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel may be heard.

Dated, New York, December 21st, 1918.

Yours, etc.,

FRANCIS G. CAFFEY,
United States Attorney,
Solicitor for the Defendants.

Office & P. O. Address, U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

To William W. Cook, Esq., 44 Wall Street, Solicitor for the Complainant.

34 In the District Court of the United States, Southern District of New York.

In Equity.

Docket No. E 15/331.

COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

Motion to Dismiss.

The Postmaster General, named as defendant in the above entitled case but not served with process therein, and the defendant Newcomb Carlton protest that the District Court of the United States for the Southern District of New York has no jurisdiction to entertain this bill of complaint as amended and without waiving this objection, but now and at all times hereafter insisting thereon, move that the bill of complaint as amended, and divers parts thereof, be dismissed, and assign the following grounds for this motion, namely:

First. The possession taken through the Postmaster General and the defendant Carlton of the complainant's property on the allegations of the bill of complaint as amended has been taken by the President, in the exercise of his executive discretion, pursuant to a resolution passed by the Congress in the exercise of its discretion, as possession by the United States and not by the defendants as individuals, and the possession and rights involved are exclusively those of the United States and of the President in the exercise of his ex-
35 ecutive duties as such, and the District Court of the United States for the Southern District of New York has no jurisdiction to entertain this bill as amended, to which neither the United States nor the President is or can be made a party.

Second. The facts alleged in the bill of complaint as amended are insufficient to constitute a valid cause of action in equity.

Third. The war existing on July 16th, 1918, still continues and there has been no proclamation of the exchange of ratifications of the treaty of peace, and of these facts the Court should take judicial notice to negative the allegation of the bill of complaint that the war ceased on November 11th, 1918, and this allegation should be stricken out and dismissed from the bill as manifestly unfounded and impertinent.

Fourth. The proclamation by and under which the possession alleged was taken, was signed by the President on November 2nd, 1918, and the proclamation by the President that it was done on November 2nd, 1918, signed by the President and attested by the Secretary of State, is conclusive that it was done on that day, and this Court should take judicial notice that it was signed on November

2nd, 1918, to negative the allegation of the bill of complaint that it was not signed until after November 11th, 1918, and this allegation should be stricken out and dismissed from the bill as manifestly unfounded and impertinent.

Fifth. The Congress has authorized the President to take over the complainant's cables and the President in his discretion has exercised judgment that the taking over of such cables is necessary for the national security and defense, and this judgment is conclusive, and the proclamation of the President that it is deemed necessary
36 for the national security and defense to take these cables is conclusive to negative the allegations of the bill of complaint to the contrary, and these allegations should be stricken out and dismissed from the bill as manifestly unfounded and impertinent.

Sixth. The resolution of the Congress and the proclamation of the President provide in terms for just compensation to the complainant to be determined by the President, and the allegations concerning the partial, arbitrary, capricious and prejudiced character of the Postmaster General do not affect the validity of the possession taken or the relief prayed for, and are manifestly unfounded and should be stricken out and dismissed from the bill as impertinent and scandalous.

Seventh. The allegation in the bill of complaint that the complainant's compensation "is intended to be, and will be, determined by the defendant (Burleson) and that the authority conferred upon the President under said Resolution, is exercised and will be exercised through the defendant" is not a sufficient allegation of any fact and does not set forth whose intention is meant to be alleged and is immaterial to the validity of the possession taken and the relief prayed for and should be stricken out and dismissed from the bill as insufficient and impertinent.

Eighth. The allegations concerning the Postal Telegraph Cable Company have no bearing on any facts concerning the complainant or the relief prayed for, and should be stricken out and dismissed from the bill as impertinent.

Ninth. The allegations concerning the economic views of the Postmaster General, namely, that he has advocated Government
37 ownership of telegraphs and cables, should be stricken out and dismissed from the bill as impertinent.

Tenth. The allegation "that the operation of said cable lines by or under the control of the defendant would be less efficient and satisfactory not only to the Government in the transmission of its cablegrams, but to the public in the transmission of public messages" is an allegation of the complainant's opinion, immaterial in view of the judgment reached by the President and the action taken by him, and should be stricken out and dismissed from the bill as impertinent.

Eleventh. The allegation "that the seizure of said cables on the ground that they were or are necessary for the national security or defence was and is a mere pretext without substance or basis of fact whatsoever" is an allegation of the complainant's opinion, immaterial in view of the judgment of the President and the action taken by

him, and if intended as an allegation of bad faith on the part of the President is insufficient and should be stricken out and dismissed from the bill as insufficient, impertinent and scandalous.

Twelfth. The allegation "that the transmission of cablegrams for the next few months between America and Europe did not and does not necessitate or justify the seizing of the ten thousand miles of cable from San Francisco," etc., is an allegation of the complainant's opinion, immaterial in view of the judgment of the President and his action taken thereon, and should be stricken out and dismissed from the bill as impertinent.

Thirteenth. The allegation of the bill of complaint that the complainant is not provided with just compensation for the taking
38 over complained of is manifestly unfounded in that Congress has in the resolution alleged expressly provided that the complainant shall receive just compensation and has provided for the executive and judicial determination thereof with recourse to the Courts in the normal and reasonable manner for the ascertainment of compensation in the case of takings by the United States, and this Court has judicial notice that Congress uniformly appropriates monies for the payment of all judgments rendered by the Court of Claims, and the allegations that the right of application to that Court is an illusory right and that there is no reasonable expectation of the timely payment of such a judgment are allegations that the United States and Congress will exercise bad faith, whereas this Court has judicial notice that the United States and Congress are incapable of bad faith, and the allegations of the bill of complaint to the contrary are manifestly unfounded and should be stricken out and dismissed from the bill as impertinent and scandalous.

Fourteenth. The allegations concerning the injury to the Commercial Pacific Cable Company's cable on September 21, 1907, and the proceedings resultant thereon disclose that the claim was one for damages sounding in tort, and therefore one of which the Court of Claims had no jurisdiction to hear and determine judicially and in respect to which said Court had no power to enter a judgment, and this Court has judicial notice that no such judgment as alleged was or could be rendered, and said allegations have no bearing upon the validity of the possession complained of, and the relief sought, and said allegations should be stricken out and dismissed from the bill as impertinent and scandalous.

39 Fifteenth. The allegations concerning the compensation awarded to the Postal Telegraph system are immaterial to the possession complained of and the relief sought, and should be stricken out and dismissed from the bill as impertinent.

Sixteenth. The allegations concerning the method to be pursued in ascertaining compensation to the complainant bear only upon the complainant's right, if any, to have some other method of compensation pursued, and not upon the validity of the possession complained of or the relief sought, and should be stricken out and dismissed from the bill as impertinent.

Seventeenth. The allegations concerning the purposes and intent of the defendant Burleson as to the method of operating the com-

plainant's cable lines, and the validity thereof under the Anti-Trust Act, do not sufficiently allege any proposed unlawful act, and do not affect the validity of the possession taken or the relief sought, and these allegations should be stricken out and dismissed from the bill as insufficient and impertinent.

Eighteenth. The allegations concerning the landings of the complainant's cables on territories of foreign nations and the complications likely to arise from the action of the Government are insufficient to state any cause of action or any part of a cause of action and have no relation to the validity of the possession taken from the complainant, or to the relief sought in the bill of complaint, and said allegations should be stricken out and dismissed from the bill as insufficient and impertinent.

Wherefore, the defendants say that they should not be held to answer to the bill of complaint as amended, or to the several allegations thereof above referred to, but that said bill of complaint as amended shall be dismissed and said several allegations should be stricken therefrom, with costs to the defendants.

40 Dated December 21, 1918.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Solicitor for the Defendants.

EDWARD F. McCLENNEN,
Special Assistant to the Attorney General, Counsel for Defendants.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Dec. 21, 1918.

41 United States District Court, Southern District of New York.

THE COMMERCIAL CABLE COMPANY

against

ALBERT S. BURLESON and NEWCOMB CARLTON.

THE COMMERCIAL PACIFIC CABLE COMPANY

against

ALBERT S. BURLESON and NEWCOMB CARLTON.

Opinion.

These cases arise on motions to dismiss two bills in equity, for lack of jurisdiction and for want of equity, and they therefore present cases based altogether upon the allegations contained in them. Each bill was similar and the consideration of one may be taken as applicable to both. They prayed an injunction against the defendants from interfering with the plaintiff's property or business of which they had claimed to take possession.

The Commercial Cable Company's bill alleges that it was a corporation of the State of New York doing business in the City of New York and engaged in the operation of a system of submarine cables in the Atlantic Ocean to Canada, Newfoundland, The Azores, United Kingdom and France. That on the sixteenth of July, 1918, the Congress of the United States by Joint Resolution authorized the President during the continuation of the present war, whenever *it* should deem it necessary for the national security and defense, to take possession of any marine cable and operate the same for the duration of the war and not beyond the date of the proclamation by the President of the exchange of the ratifications of the treaty
42 of peace. That on the eleventh day of November, 1918, an armistice was signed suspending hostilities during the present war, and immediately thereafter the duration of the war within the purpose of the resolution terminated. That on the sixteenth of November, 1918, the defendant Burleson, assuming to act under a proclamation of the President, took possession of the plaintiff's cables and also of the cables of the Commercial Pacific Cable Company, the other plaintiff, from San Francisco to China, Japan and the Philippines and to South America from the City of New York. That the proclamation of the President, on which the defendant Burleson acted, was dated November second, 1918, a copy of which was annexed, and asserted that the President deemed it necessary for the national security and defense to take possession of all marine cable systems in the country.

That the seizure was illegal and void because the war had terminated within the meaning of the Resolution, because Congress had no power to authorize possession to be taken under the circumstances existing at that time, because it was not necessary for the national security and defense to deprive the plaintiff of its property without due process of law and without compensation, because it was not for any public use and because the defendant Burleson was not an impartial tribunal to determine the plaintiff's compensation for the use of the cables. That proper and legal provision had not been made for the plaintiff's compensation, and that the purpose was to consolidate the plaintiff's system with that of its competitor, The Western Union Telegraph Company, in violation of the Anti-Trust Act of Congress and to suppress competition between the two.

That full, adequate, complete, quick and correct cable service had been given by the plaintiff throughout the period of the war
43 to the government, whose messages had taken precedence over all others. That there had been no complaint on the part of the government nor was there any occasion therefor in the quick and accurate transmission of its messages. That the plaintiff's cables had been worked to their utmost capacity by a competent staff of officers and operators; that the service could not be increased and bettered; that the operation of the cable lines under the control of the defendant Burleson would be less efficient and satisfactory to the government and the public, and that the ground given for the seizure was a mere pretext without substance or basis.

That the cables had theretofore been under the absolute control

of officials of the United States and that nothing had been done by the plaintiff in their operation without the knowledge and approval of the Director of Naval Communications, whose every request and suggestion had been complied with by the plaintiff in every particular; that the plaintiff had co-operated in a most rigid censorship which was established by the government and had met all demands and requests of the government fully and completely; that the transmission of cablegrams between America and Europe did not necessitate or justify the seizure of ten thousand miles of cable between San Francisco, China, Japan and the Philippines, or the seizing of the cables from New York to South America, nor of those to Cuba and Mexico, nor the seizing of thirteen cables across the Atlantic. That the seizing of such thirteen cables did not facilitate in the slightest degree the transmission of government messages; that they had been already worked to their utmost capacity as fully and efficiently as they could be worked if operated by the government.

44 That the Joint Resolution of Congress was unconstitutional in that compensation was not provided before an impartial jury or commission; that the defendant Burleson was an improper and unfair tribunal to make a provisional estimate of the plaintiff's damages; that the appeal to the Court of Claims was illusory because no provision was made for paying any judgment that the plaintiff might obtain; that there was no compulsory process by which a judgment of the Court of Claims could be collected, and that it was entirely voluntary with Congress whether such judgment should be paid or not.

That the defendant Burleson intended to consolidate the plaintiff's business with that of the Western Union Telegraph Company so that its separate identity and business would disappear and the plaintiff would be forced to abandon competition thereafter and acquiesce in the defendant Burleson's plans for government ownership of the same: all in violation of the Sherman Act.

The Joint Resolution under which the President acted contained a provision that just compensation should be made for possession of any cable seized, in an amount to be determined by the President and if the amount so determined was unsatisfactory the person interested might receive seventy-five per cent of the amount so determined and should be entitled to recover such further sum as might be awarded in accordance with Section 24, Paragraph 20 and Section 145 of the Judicial Code. The first of these provisions authorized suits to be brought in the District Court, and the second a suit to be brought in the Court of Claims upon claims of similar character.

By amendment to the bills the name of the defendant Carlton was added wherever the defendant Burleson's name appeared and

45 an allegation was also added that the landings of some of the cables were in foreign countries and seizure of them by the United States would constitute a violation of international law, of which all nations were properly jealous. That if such seizure was obtained by consent the consent would constitute in substance a treaty

which could only be made with the concurrence of the Senate, wh consent had not been obtained.

There was also coupled with the motions, motions to strike certain parts of the bill as irrelevant, impertinent and scandalo but in view of the disposition made of the case these motions n not be set forth.

Edward F. McLennan, Harold Harper and Charles N. Brace for the motions.

Charles E. Hughes and William W. Cook opposed.

LEARNED HAND, *D. J.*:

I shall dispose of this case upon the merits and without consideri two questions raised which go to the jurisdiction of the court. T first is that the bills pray for injunction against the United Sta the second, that they are in effect directed against the Preside The second question involves this; whether a court should pas decree which directly contradicts an order made by the President which must necessarily be enforced only through sanctions depend upon his execution of the writ. As the merits of the case invo questions of importance, it appears to me more desirable to base decision upon them, only premising that the preliminary objecti I pass without deciding. The theory of the bills is two-fold, first t the seizure of the cable lines on November sixteenth, 1918, was justified by the Joint Resolution of July sixteenth, 1918; seco that the Resolution itself was an insufficient warrant, thou
46 its terms had been followed. I shall consider these in th order.

The Joint Resolution authorized the President to seize any cab when he deemed it "necessary for the national security and defen and the bills insist that the issue is justiciable in this court whet there was any such necessity. The scope of the court's inquiry n not concern me for, if no inquiry whatever is possible, its scop irrelevant. The plaintiffs assume under the rule in such cases Field v. Clark, 143 U. S. 649, American School of Magnetic Heali v. McNulty, 187 U. S. 94, Buttfield v. Stranahan, 192 U. S. 4 Union Bridge Co. v. U. S. 204 U. S. 364, Interstate Commerce v. L. & N. R. R. Co., 227 U. S. 88, Geglow v. U. S., 239 U. S. that the grant given by the resolution of Congress is in effect limi by its right to delegate general legislative power. If so, they say can be extended only so far as to depute to an official, whether or he be the President, the duty of ascertaining a fact or some fa which Congress has made a condition upon the incidence of the le lative act. Moreover, since that incidence is dependent upon actual exercise of some intelligible decision upon the fact confided the public official, his decision is reviewable to this extent, that th must be a tenable basis in the evidence from which a reasonable m could have reached the same conclusion. Thus it becomes justicia though to a limited degree.

If it be admitted that the Joint Resolution falls within this class

might still be contended under the latitude extended to the rule in cases like Buttfield v. Stranahan supra, and Union Bridge Co. v. U. S., supra, the question of fact entrusted to the President could be considered to involve all those matters of public policy which made up the national security and defense. In those cases it was
47 held proper for Congress to depute to officials the power to establish standards or forms of conduct to which the public must conform. This was certainly a very different duty from ascertaining whether a fact defined in general language had occurred. Even so, the decision would be justiciable and it would become necessary to consider the allegations in the bills, but I do not rely upon any such extension of the rule, because the Joint Resolution does not fall into the class of legislation which those cases control. It was not a rule for the future conduct of individuals, like most legislation; it was the sovereign act of condemning the temporary possession of private property for public use, rather administrative than legislative in its nature as those terms are generally used, though it must of course proceed from Congress. As such the question is whether the use to which the property was condemned was a public use within the accepted rules, and how that use should be defined.

I may assume for the moment that the use intended was to put the property at the general disposal of the President in the discharge of some of his constitutional functions without inquiry as to the specific purposes which he might have in mind. It is true that Congress might, if it chose, have required the President to state the occasion which he thought made his possession necessary and the uses to which he would put it, but that is not the point. If he had asked of Congress the immediate possession of the cables, would it have been lawful for them to consent to that possession without reserve or question? Had he been a private person, this clearly would not be the case; some public use must have been disclosed and the possession dedicated to it alone. The President is, however, vested by the Constitution with certain duties in whose discharge he is exempt from inquiry by courts. His discharge of
48 those duties as the Constitution imposed them is in the highest sense a public use and the committal to him of means to discharge them falls into the same category. Therefore, if the President had asked of Congress the possession of property for use in his capacity, for example, as commander-in-chief, it would have been as lawful for them to entrust it to him without condition as though they appropriated money for his disbursement.

If so, there was no reason why they should not have suspended the time of possession until in his judgment it became advisable that he should acquire it. Into the occasion of his necessity they need as little inquire as though he had asked for it at once. All that was necessary was that he should ask for it in some capacity which the Constitution recognized. Furthermore, it is not necessary that the capacity should be expressly stated so long as it is apparent that the property condemned was in its nature appropriate to the exercise of some constitutional function. I must assume that when he re-

quired it, he required it by virtue of some constitutional power, so long as that might have been the case.

The question is therefore rather of the power of Congress to condemn property for the President's use within his limited powers, than of his exercise of them. The latter in any event must be exempt from impediment by individual interests before courts. If Congress have not the power obviously it cannot put into the President's hands those instruments which may be essential to the discharge of his duties except upon condition that he submit to a control from which in other respects he is exempt. That the Constitution should prescribe so unworkable a system seems to me unthinkable. Without the co-operation of Congress the President is substantially without means to exercise his prerogative. If he must justify before courts
49 any occasion he may have to accept their assistance government becomes in the final analysis not one of laws but of courts. Cases such as Mitchell v. Harmony, 13 How. 115 and U. S. v. Russell, 13 Wall. 623, are quite different. There the power depended upon the common-law, which imposed upon its exercise the condition that the emergency was actual. It became necessary to scrutinize the decision of the officer exercising the power to ascertain whether it existed.

Having such power, did Congress intend to bestow upon the President possession at his mere assertion that he wished it? Without doubt. The language of the Resolution is that he may seize the cables "whenever he shall deem it necessary"; his conclusion is the single condition. The occasion lent color to this interpretation. The war was at its height; the nation was using every energy and resource towards its effective prosecution. The President as its executive head was responsible for its success, and the purpose of concentrating in him a power commensurate with that responsibility was obvious in all contemporary legislation. That Congress should have contemplated the possibility that he should be compelled at the suit of an individual to disclose and justify the reasons for his act is beyond possibility. He had to act quickly, certainly and without the trammels of courts or private interests.

Are there, then, constitutional powers of the President to whose discharge the possession of such property was suitable? If for the moment one considers the question if it had arisen before November 11, 1918, the answer is immediate. Cable lines leading to the theatres of war, Europe and Asia, were obviously appropriate to the conduct of military operations. I need hardly expatiate upon the vital necessity of rapid communication to military success.
50 Nor does it make the least difference whether the plaintiffs are right in saying that they were already giving as good service as could be obtained under governmental control. The single question is whether they possessed an instrument available for military use; if so, the President as commander-in-chief had the sole power to determine whether it was wiser to acquire possession or to operate it otherwise. Nor do the cables leading elsewhere introduce any difficulty. The cables were already in one system of management and under one control, and it was not essential that

only those which were immediately important to actual military operations should be taken. If the operation of those immediately necessary would be facilitated by possession of all, that was enough. But indeed, it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theatre of military operations. The espionage system of the enemy we are told was not limited to belligerents—at least it may be so. Provision for supplies and material could not be made without an eye to the resulting scarcity at home and the available substitutes abroad. In a war which has called for the last resources of the belligerent powers, and where the United States was in active military co-operation with many of these belligerents, it is quite impossible to say that means of telegraphic communications anywhere in the world were not appropriate to its prosecution. If the President, who by virtue of his office was charged with the successful conduct of the war, decided that any such means were necessary, his decision was final.

The plaintiffs do not, however, take that position. They rely upon the fact that after November 11, 1918, the war was from a military aspect closed and that the powers of the President had
51 changed. By virtue of what fact did they change? Not by the intent of Congress, because the resolution expressly extends the powers until peace has been declared. Had they intended that a suspension of hostilities should terminate the right, they would not have said precisely the contrary. Nor did they change by any limitation of the Constitution that I know. Even if I were to assume that the power were only co-extensive with a state of war, a state of war still existed. It is the treaty which terminates the war. The Protector, 12 Wall. 700, Hijos v. U. S., 194 U. S. 315. An armistice effects nothing but a suspension of hostilities; the war still continues.* It is true that a war may end by
52 the cessation of hostilities, or by subjugation, but that is not the normal course, and neither had hostilities ceased, nor had the enemy been subjugated in the sense in which that term is used. There were still military operations, the armistice had not been car-

*Oppenheim, International Law, Vol. II War. Secs. 231, 233, 260-266.

Sec. 231. "Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact, as does likewise the right to capture neutral vessels attempting to break the blockade, and the right to seize contraband of war."

Articles 36 and 37 of the Fifth Convention at the Second Hague Conference are as follows: (translation)

"Art. 36. An armistice suspends military operations by mutual agreement of the belligerents. If its duration is not determined the belligerents may resume such operations at any time provided always that the enemy is advised within the agreed time and in conformity with the conditions of the armistice."

"Art. 37. An armistice may be general or local. The first everywhere suspends military operations between the belligerent states, the second only between certain parts of the belligerent armies and within a fixed radius."

ried out, and after it was, armed forces of the United States were i occupation of enemy territory and were in European and Asiati Russia, where indeed they still remain. The President was still i command of those forces and to their conduct telegraphic communi cation was still essential. All that the armistice could do was to in troduce a new, though very vital, consideration into his decision, bu it did not affect its finality. A court might conclude that ther was no basis for the seizure, but a court would have as little right t entertain the issue before as after the armistice.

There is, moreover, another constitutional power of the President under which the seizure was justified, and which also depends upo the existence of war, his initiative in the making of treaties. Wa is not the release of primitive combative instincts; it is an enterpris conducted for purposes consciously understood, whose realizatio gives to it its only rational significance.* The national s
53 curity and defense is to be judged not by the immediate pre ent, but by the stability of the ensuing state of peace. Th terms of the final conventions, the success of the nation in achievin the aims with which it set out, and which it may have adopte during the progress of war, are the measure of that security and de fense. Those aims, whatever they are, are deemed essential to som vital national interest, not necessarily confined to freedom from im mediate invasion. It may destroy the armed opposition of th enemy and wholly fail in securing its defense of those interest The President is charged by his function of negotiating, for presen tation to the Senate, a treaty of peace, with the duty of reducin to preliminary form the success which the arms of the nation ma have made possible. His right to hold the cables for such purpose if valid at all, certainly was not affected by the armistice.

Had the possession of the plaintiffs' cables any relation to th negotiation of peace? Obviously the possession of some telegraphi communication is essential, leading not only to the immediate plac where the negotiations may go on, but to any part of the worl which may be affected by, or may affect, the result. Many nation have been involved, many may intervene in the conference; n one can at the moment predict to what part of the world immediate secret and rapid communication may become a vital necessity for th success of the nation's purposes. Again, as in assistance to the con

*Oppenheim, op. cl. Sec. 54: "War is the contention between two or mor States through their armed forces for the purpose of overpowering each othe and imposing such conditions of peace as the victor pleases." Sec. 66. End of war are those objects for the realization of which a war is made. In th beginning of the war its ends are determined by its cause or causes, as alread said. But these ends may undergo alteration, or at least modification, wit the progress and development of the war. No moral or legal duty exists fo a belligerent to stop the war when his opponent is ready to concede the object for which war was made. If war has once broken out the very national ex istence of the belligerents is more or less at stake. The risk the belligerent run, the exertion they make, the blood and wealth they sacrifice, the reputa tion they gain or lose through the changing fortunes and chances of war—a these and many other factors work or may work together to influence the end of a war so that eventually there is scarcely any longer a relation betwee them and the causes of the war."

duct of war, if the cables be appropriate to a discharge of the President's constitutional duty, the number seized and the service rendered under governmental operation is not open to examination. The decision may be wrong; it may even be actuated by purposes other than those intended by Congress, but the relief is not from judges.

54 The considerations which might dictate it are so obviously political in character as to preclude the possibility of their public disclosure or of their judicial determination. If possible, they are more foreign to the questions which courts may settle than those determining the propriety of the seizure of an instrument of active warfare. Whatever means are in their nature available to the successful conduct of negotiation are open to the President to use while negotiating, if Congress chooses to put them at his disposal.

It is true that if the issues were justiciable, I am not prepared to say that the allegations of the bills would not present a case. Taken favorably, as I must take them, they say that the plaintiffs have given a service which in speed, in volume, in organization and in secrecy have been all that the property is capable of giving. I take this to include either separate operation or joint control. In any event, the defect it it were strictly a defect could be supplied by amendment. It is plain that marine cables cannot be used for anything but the transmission of intelligence and such allegations seem to me unavoidably to present for determination whether the change in possession could improve the character of the service and so be necessary to the security and defense of the nation in the only respect in which it could assist in that defence. If that question were open to courts at all, I cannot think of any assertions which would better serve to open it. The defendants' argument that a trial might involve political considerations improper for disclosure, only goes to the propriety of any trial at all, not to the necessary inference from the allegations, if they be true. If true, there was no public necessity; hence the issue is well framed, if it is justiciable. I hold that it is not.

The remaining question is simply of the adequacy of the provisions for compensation. The allegations touching the par-

55 tiality of the defendant, Burleson, are irrelevant. He will not make the preliminary estimate of the compensation due, but the President, who has not yet even deputed the defendant to advise him. Even had he done so the final decision rests with him and he cannot finally delegate it under the Joint Resolution, whatever assistance he may take. But the whole question is irrelevant in any case because of the resort given to the Court of Claims. If that be adequate, the resolution is valid. Upon that question I am concluded by the decision of the Supreme Court in Crozier v. Krupp, 224 U. S. 290. The language upon which the plaintiffs rely to distinguish that case does not appear to me to indicate that a similar provision here should be considered inadequate. It occurs upon page 306 and refers to the intangible nature of the property taken, its possible importance to conduct of the government and the pledge of good faith for payment. Of these the second two certainly apply in the cases at bar and the first as well, as I understand the opinion.

I assume that the reason why the Chief Justice referred to th intangible character of the property taken was because it was im possible in advance to determine its value. The value of th temporary possession of the plaintiffs' cables is as difficult of asce tainment. It was necessarily uncertain when that possession woul begin and how long it would continue. How great would be th damage done could be ascertained only after a calculaton whic could not even approximately be made in advance. Pressing necess ties of the most vital nature required the power to be given and di not admit of any preliminary appropriation. The same statute wa considered in Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, an its scope somewhat limited, but it is clear, page 42, that the Cou meant to repeat its decision that when a public officer of th
56 United States takes a patent right, it was by virtue of th right of eminent domain and that a resort to the Court Claims was adequate compensation. At least in the face of thos declarations it would be an obvious impropriety for a District Judg to hold otherwise.

I conclude, therefore, that the seizure was within the powers con ferred by Congress, ancillary to the constitutional powers of th President, whose execution it was intended to assist, and that th Joint Resolution gave adequate compensation. Of the propose conduct of the defendant in consolidating the cables under on management, whether or not it be in contravention of the Sherma Act, the plaintiffs are not in a position to complain.

The motions are granted and the bills will be dismissed with cost January 10, 1919.

L. H., *D. J.*

Filed Jan. 10, 1919.

57 At a Stated Term of the District Court of the United Stat for the Southern District of New York, Held at the Unit States Courts and Post Office Building, in the Borough Manhattan, City of New York, on the 15th Day of Januar 1919.

Present: Honorable Learned Hand, United States District Judg

In Equity.

Docket No. E 15/331.

COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

Decree.

The defendants above-named having moved this Court, amo other things, that the bill of complaint herein, as amended, be d

missed with costs to the defendants, and the said motion having come on to be heard on the 27th day of December, 1918,

Now, after hearing Edward F. McClennen, Esq., Special Assistant to the Attorney General, and Harold Harper, Esq., Assistant United States Attorney, of Counsel with the defendants, in support of said motion, and Charles E. Hughes, Esq., of Counsel with the complainant, in opposition thereto, and due deliberation having been had, on motion of Francis G. Caffey, Esq., United States Attorney, Solicitor for the defendants, it is hereby

Ordered, adjudged and decreed that the said motion be and the same hereby is granted and the said bill of complaint, as amended be and it hereby is dismissed upon the merits, and the defendants have judgment for costs to be taxed by the Clerk of the Court.

LEARNED HAND,
United States District Judge.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, Jan. 14, 1919. William W. Cook, Att'orney for Complt.—U. S. District Court, S. D. of N. Y. Filed Jan. 15, 1919.

58 (*Appeal and Allowance.*)

United States District Court for the Southern District of New York.

In Equity.

COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

against

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

To the Honorable Learned Hand, District Judge:

The above named complainant, feeling itself aggrieved by the decree made and entered in this cause on the 15th day of January, A. D. 1919, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed, and that a citation issue as provided by law, and that a transcript of the record of the proceedings and papers upon which said decree was based duly authenticated, may be sent to the Supreme Court of the United States, sitting in the City of Washington, in the District of Columbia.

Your petitioner further prays that the proper order touching the security required of it to procure its appeal be made.

Dated, January 15th, 1919.

WILLIAM W. COOK,
Solicitor for Complainant.

Office & Post Office Address, 44 Wall Street, the City of New York, N. Y.

59 The petition is granted and the appeal allowed upon giving a bond conditioned, as required by law, in the sum of $250.

LEARNED HAND,
Judge of the United States District Court for the Southern District of New York.

On January 15, 1919, a bond in the sum of $250.00, approved by Judge Learned Hand, U. S. District Judge, was filed in the Clerk's Office by the Appellant, Commercial Pacific Cable Company.

60 (*Assignment of Errors.*)

In the District Court of the United States, Southern District of New York.

In Equity.

COMMERCIAL PACIFIC CABLE COMPANY, Complainant,

against

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

Now, on this, the 15th day of January, 1919, comes the complainant by i's attorney William W. Cook, and says that the decree entered in the above cause on the 15th day of January, 1919, dismissing the bill, is erroneous and unjust to complainant:

1. Because the said decree dismissed the bill.
2. Because it did not hold that the bill was not against the United States.
3. Because it did not hold that the bill was not directed against the President of the United States.
4. Because it holds that the seizure of complainant's cables on November 16th, 1918, was within the powers conferred by the Joint Resolution of Congress of July 16th, 1918.
5. Because it holds that said Joint Resolution is constitutional in regard to its provision for the payment of just compensation to complainant.
6. Because it holds that the said seizure of said cable lines on November 16th, 1918, was justified by the said Joint Resolution.

61 7. Because it holds that the action of the President in seizing said cables on November 16th, 1918, is not justiciable and that the court has no power to question the action of the President and the necessity for the seizure of said cables on said date.

8. Because it holds that the decision of the President that the said seizure of said cables was necessary for the national security and defense cannot be reviewed by the court under any circumstances.
9. Because it holds that the power delegated by the said Joint Resolution of Congress to the President confers powers, the exercise of which cannot be reviewed by the court.
10. Because it holds that the court has no power to inquire whether there was a tenable basis for the action of the President in his said seizure of said cables.

11. Because it holds that the said Joint Resolution and the action f the President thereunder was administrative and not legislative.

12. Because it holds that the Joint Resolution put said cables at he general disposal of the President in the discharge of his constitu- ional functions without inquiry as to the specific purposes he might ave in mind, and that the court cannot review his action in regard hereto.

13. Because it holds that the seizure of said cables by the President was not limited by the terms of said Joint Resolution but 52 gave a discretion within some capacity which the Constitution recognized.

14. Because it holds that said seizure cannot be questioned by the ourt if its seizure was appropriate to the exercise of some constitu- ional function.

15. Because it holds that said Joint Resolution and the exercise of ower thereunder by the President was the same as condemnation f property by Act of Congress for the President's use.

16. Because it holds that if the court should have jurisdiction to eview the action of the President herein the system of government nder the Constitution would be unworkable and unthinkable.

17. Because it holds that said Joint Resolution and the exercise by the President of his power thereunder is a mere exercise of the President's prerogative under the Constitution.

18. Because it holds that if the court has power to review the action of the President the result would be government by courts and not by laws.

19. Because it holds that Congress by said Joint Resolution intended to bestow upon the President possession of said cables at his mere assertion that he wished such possession.

20. Because it holds that the language of the Joint Resolution authorizing the President to seize said cables "whenever he shall deem it necessary" made his action conclusive on the court.

21. Because it holds that Congress did not contemplate by said Joint Resolution the possibility that the President should not be free from justifying the reasons for which he seized said cables.

53 22. Because it holds that the President as Commander-in-Chief had, under said Joint Resolution, the sole power to determine whether it was wiser to seize possession of said cables or to allow them to be operated as they had been.

23. Because it holds that the seizure of the cables not immediately important to actual military operations was justified.

24. Because it holds that the decision of the President that the seizure of the cables was necessary, was final.

25. Because it holds that the war so far as the military emergency was concerned did not end nor the powers of the President change after November 11th, 1918, the date when the armistice was signed.

26. Because it holds that such a state of war still existed after November 11th, 1918, as to justify the seizure of said cables by the President.

27. Because it holds that nothing but a treaty could terminate the war, within the meaning of the words of said Joint Resolution.

28. Because it holds that the court had no more right to question the basis for the seizure after the armistice than before the armistice.

29. Because it holds that such seizure of said cables was justified under the power of the President to initiate the making of treaties.

30. Because it holds that the words "national security and defense" as used in said Joint Resolution, are to be judged by the stability of future peace.

31. Because it holds that the words "national security and defense", as used in said Joint Resolution, pertain to the terms of the
64 final Convention of peace and the success of the nation in achieving the aims for which it set out.

32. Because it holds that the President had a right to seize and hold said cables in connection with his function of negotiating for presentation to the Senate of a treaty of peace.

33. Because it holds that the seizure of the cables in connection with the negotiations for peace involve not only the cables to the place where the negotiations were going on, but cables to any part of the world.

34. Because it holds that the court cannot inquire into the necessity of taking all of the cables instead of a part of them.

35. Because it holds that even though the purposes for which the President seized said cables were not the purposes intended by Congress, and even though such purposes are obviously political in character, yet the courts cannot inquire into them.

36. Because it holds that the issues presented by the bill of complaint are not justiciable.

37. Because it holds that even though there is no public interest involved in the seizure of the cables, yet that the court has no jurisdiction to question the same.

38. Because it holds that the provisions in said Joint Resolution for compensation are constitutional and adequate.

39. Because it holds that the partiality of the defendant
65 Burleson in connection with the fixing of the compensation to be paid to complainant is irrelevant.

40. Because it holds that the defendant Burleson will not make the preliminary estimate on the compensation, but that it will be made by the President.

41. Because it holds that the resort given by the Joint Resolution to the Court of Claims is adequate and constitutional.

42. Because it holds that the value of the temporary possession of complainant's cables is difficult of ascertainment and requires a calculation which could not be made even approximately in advance.

43. Because it holds that a pressing necessity of the most vital nature required that power be given to the President to seize said cables, and did not admit of any preliminary appropriation.

44. Because it holds that the seizure was within the powers conferred by Congress ancillary to the constitutional powers of the President whose execution it was intended to assist.

45. Because it holds that the Joint Resolution gave adequate compensation.

46. Because it holds that the proposed conduct of the defendants in consolidating the cables under one management cannot be complained of by the complainant as in violation of the Sherman Anti-Trust Act of Congress of July 2, 1890.

47. Because it does not hold that within the letter, purpose and spirit of said Joint Resolution the duration of the war ceased when an armistice was signed suspending hostilities, so far as the seizing and control of said cables was concerned.

66 48. Because it does not hold that the seizure of complainant's cables was unconstitutional, unauthorized, ultra vires, illegal and void.

49. Because it does not hold that the war, within the meaning of said Joint Resolution, had terminated prior to the time of said seizure.

50. Because it does not hold that Congress had no power or authority under the Constitution to authorize the taking possession and control and operation of said cable system under the circumstances existing at the time of said seizure.

51. Because it does not hold that such seizure was not reasonably necessary for the national security and defense.

52. Because it does not hold that said seizure deprived complainant of its property without due process of law.

53. Because it does not hold that said seizure took complainant's private property for public use without just compensation to complainant.

54. Because it does not hold that said seizure was an unreasonable and arbitrary seizure.

55. Because it does not hold that said seizure was not for public use.

56. Because it does not hold that no proper and legal provision had been made for the payment of compensation to your complainant, and that complainant was not even authorized to retain its regular profits of its own property.

57. Because it does not hold that the national security and defense within the meaning of the Joint Resolution was fully attained by the signing of said armistice and by the discontinuance of

67 hostilities under the present war.

58. Because it does not hold that the seizure of said cables on the ground that they were necessary for the national security and defense was a mere pretext without substance or basis of fact whatsoever.

59. Because it does not hold that the seizure of complainant's future income, as well as its physical properties, namely, said cables, deprives complainant of its income, moneys and profits without due process of law, and takes complainant's private property for public use without just compensation.

60. Because it does not hold that the defendant Burleson claims the right to take your complainant's daily profits and return a small part thereof to complainant, and keep the remainder in violation of the Constitution of the United States.

61. Because it does not hold that the defendant Burleson, in fixing the compensation to be paid for the use of said properties proceeds

on a fundamentally wrong principle, namely, that he should pay merely 6% on an arbitrarily fixed physical value of the property without any allowance for earning power and without any correct method even of arriving at said appraised value, and that this is the taking of property without due process of law and without proper compensation being made or provided for.

62. Because it does not hold that the power to fix compensation has been illegally delegated.

63. Because it does not hold that the defendant's purpose and intent to intermingle, unite, consolidate and merge complainant's business, good will, staff, organization, employees, plants and
68 equipment with that of its competitor, the Western Union Telegraph Company, so that the separate identity, business and good will of complainant will disappear, so that complainant may be forced or persuaded to abandon competition hereafter, and acquiesce in defendant's plans for government ownership of the same, or an amalgamation of all the cables in the Atlantic Ocean, is material and constitutes a cause of action.

64. Because it does not hold that the seizure of said cables, involving cable landings on shores of foreign countries and jeopardizing, according to the allegations of the bill of complaint, complainant's cables, cable landings and relations with foreign governments, furnishes a basis for this bill.

Wherefore, complainant prays that the said decree be reversed, and that the District Court be directed to decree that the bill of complaint should not be dismissed, and that the Supreme Court of the United States shall reverse and render a proper decree on the record, etc.

WILLIAM W. COOK,
Solicitor for Complainant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, City of New York, N. Y.

(Endorsed:) A copy of the within paper has been this day received at this office. Jan. 15, 1919. Francis G. Caffey, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Jan. 15, 1919.

69 (*Citation on Appeal.*)

UNITED STATES OF AMERICA, *ss:*

To Albert S. Burleson and Newcomb Carlton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 3rd day of February, nineteen hundred and nineteen, pursuant to an appeal, filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein The Commercial Pacific Cable Company is appellant and Albert S. Burleson and Newcomb Carlton are respondents, to show cause, if any there

be, why the decree in said appeal should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Edward Douglass White, Chief Justice of the United States, this 15th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[Seal District Court of the United States, Southern District of N. Y.]

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York.

70 [Endorsed:] Docket No. E. 15-331. In Equity. In the District Court of the United States, Southern District of New York. Commercial Pacific Cable Company, Complainant, against Albert S. Burleson and Newcomb Carlton, Defendants. Original. Citation on Appeal. William W. Cook, Solicitor for complainant, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office. Jan. 15, 1919. Francis G. Caffey, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Jan. 15, 1919.

71 UNITED STATES OF AMERICA,
Southern District of New York, ss:

COMMERCIAL PACIFIC CABLE COMPANY, Complainant-Appellant,

vs.

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants-Appellees.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 16th day of January, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-third.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Clerk's fee for certifying record $18 50-100.

ALEX GILCHRIST, JR., *Clerk.*

[Endorsed:] United States Supreme Court. Commercial Pacific Cable Company, Complainant-Appellant, vs. Albert S. Burleson and Newcomb Carlton, Defendants-Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern Distdict of New York.

Endorsed on cover: File No. 26,902. S. New York D. C. U. S. Term No. 816. Commercial Pacific Cable Company, appellant, vs. Albert S. Burleson and Newcomb Carlton. Filed January 20th, 1919. File No. 26,902.

No. 815 & 816

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY,
COMPLAINANT-APPELLANT,

vs.

ALBERT S. BURLESON AND NEWCOMB CARLTON,
DEFENDANTS-RESPONDENTS.

COMMERCIAL PACIFIC CABLE COMPANY,
COMPLAINANTS-APPELLANT,

vs.

ALBERT S. BURLESON AND NEWCOMB CARLTON,
DEFENDANTS-RESPONDENTS.

MOTION TO ADVANCE.

Supreme Court of the United States,

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, Complainant-Appellant, *vs.* ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants-Respondents.	No.....
COMMERCIAL PACIFIC CABLE COMPANY, Complainant-Appellant, *vs.* ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants-Respondents.	No.....

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion to Advance.

Comes now Bynum E. Hinton, appearing on behalf of the appellants, The Commercial Cable

Company and the Commercial Pacific Cable Company respectively in the two suits in equity involved on this appeal, and respectfully moves the court to advance the above entitled two causes for hearing to a near day convenient to the Court.

These suits were brought in the United States District Court for the Southern District of New York by The Commercial Cable Company and the Commercial Pacific Cable Company respectively on similar bills in equity praying adjudication (1) that defendants be enjoined from taking possession and assuming control of the complainants' respective submarine cable systems, that of The Commercial Cable Company being in the Atlantic Ocean from America to Europe and Cuba, and that of the Commercial Pacific Cable Company being from San Francisco to China, Japan and the Philippine Islands; (2) that the defendants be further enjoined from interfering with the complainants' respective property or business; and (3) that the defendants be further enjoined from taking any steps or making any demands in connection therewith. Both cases arise under the Constitution and laws of the United States and in each case questions are involved as to the construction or application of the Constitution of the United States and the constitutionality of a law of the United States.

The defendant Burleson is Postmaster-General of the United States and the defendant Carlton is President of the Western Union Telegraph Company and has been appointed by the defendant Burleson as the representative of the latter in seizing or attempting to seize complainants' respective two cable systems. The Bill alleges that on or about November 16th, 1918, the defendant

Burleson issued an order (a copy of which is attached to the Bill and marked Exhibit "C"), whereby defendant Burleson states that he has assumed possession and control of said two marine cable systems, and such order states that it is pursuant to a proclamation by the President of the United States dated November 2, 1918. A copy of that proclamation is attached to the Bill and marked Exhibit "B". It purports to be based on a Joint Resolution of Congress of July 16th, 1918, authorizing the President "during the continuance of the present war * * * whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control" of any marine cable, etc., systems, and to operate the same for a time not later than the proclamation by the President of the exchange of ratifications of the treaty of peace. A copy of that Joint Resolution is attached to the Bill and marked Exhibit "A".

The defendant Burleson in connection with the seizure or alleged seizure by him of the complainants' respective two cable systems has by order dated December 12th, 1918, removed from any connection with the supervision, possession, control or operation of complainants' two cable systems, Clarence H. Mackay, the President of those companies, and George G. Ward, the General Manager of those companies, and William W. Cook, the General Counsel for those companies, and by the same order the defendant Burleson directed that the defendant, Newcomb Carlton, President of the Western Union Telegraph Company, a competitor of the defendant, The Commercial Cable Company, assume the management and operation of said two cable systems, although all of the five cables of The Commercial Cable Company across the Atlantic

are in operation, while only four of the eight cables of the Western Union Telegraph Company across the Atlantic are in operation and the Western Union Telegraph Company has no cables whatsoever in the Pacific Ocean. By a previous order dated November 30th, 1918, said Burleson removed as General Manager of the Postal Telegraph-Cable Company system throughout the United States Mr. Edward Reynolds, that Company being a connection and part of complainants' telegraph-cable system. As the result of these various acts and other acts of the defendants Burleson and Carlton, the organization of the staff, employees, business, etc., of the complainants in these two suits, namely, The Commercial Cable Company and the Commercial Pacific Cable Company, is naturally and necessarily affected to the great detriment of those two companies.

The complainants in their bills of complaint set forth that their two cable systems were seized or claimed to have been seized by the defendant Burleson five days after the armistice had been signed in the present war, namely, November 16th, 1918, the armistice having been signed November 11th, 1918, and that there was no occasion whatsoever, so far as the national security or defense was concerned, for such seizure, much less any necessity therefor, and complainants claim in their bills of complaint that the courts have power to review the legality of such seizure under these circumstances, and the complainants make various allegations in their bills in equity demonstrating that there was no semblance of justification so far as national security or defense was concerned, for the seizure of these cables, and the complainants in their bills of equity further allege that the real cause, purpose and intent of the defendant Burleson in seiz-

ing said cables was to further certain ideas which he has entertained for many years with respect to Government ownership. Complainants further allege in their respective bills of complaint that no proper provision under the Constitution of the United States has been made for payment of compensation to the complainants by the Government for the use of said cables while under Government control during the war.

Judge Hand in his opinion reached the conclusion that the two cases are not justiciable; in other words, that the courts under the Constitution of the United States have no power to question the authority for or the legality of the seizure of said cables in the light of the conditions under which they were seized; and no power to review the question of whether the national security or defense could fairly or properly be deemed to require the seizure of said cables on November 16th, 1918. Judge Hand further held that the Joint Resolution gave the President the power to seize said cables on his mere assertion that he wished possession. He also held that the Joint Resolution was not unconstitutional on account of not making proper provision for payment of compensation. He held that the seizure did not deprive complainants of their property without due process of law, and was not the taking of private property for public use without compensation, and was not an unreasonable and arbitrary seizure, and was not unconstitutional, unauthorized, *ultra vires*, illegal and void.

Not only is this litigation of the utmost consequence to the complainants whose property has been seized, but the proposition that the exercise by the Executive Department of the Government of a power delegated by Congress cannot in any

circumstances be questioned, reviewed or passed upon by the courts is a proposition of the utmost public consequence.

This application to advance is made by virtue of subdivision 7 of Rule 26 of Rules of the Supreme Court of the United States, on the ground that there are special and peculiar circumstances attaching to this case, as shown above to the Court, which show the importance to the two complainants and also to all other American cable companies and to the public, of having as speedily as possible a final determination of the question of the legality of these seizures because of the effect on complainants' organization, staff, employees, and on the public service and cable communication in Europe and Asia.

Respectfully submitted,

BYNUM E. HINTON,
Counsel for Appellants.

on. Alex. C. King,
Solicitor General.

Please take notice that the foregoing
tion will be submitted to the Court on Monday
nuary 27, 1919.

Bynum E. Hinton
Counsel for appellants.

The foregoing notice accepted this
i day of January, 1919.

Alex. C. King
Solicitor General.

18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

No. 815

THE COMMERCIAL CABLE COMPANY,
Appellant,

vs.

ALBERT S. BURLESON and NEWCOMB CARLTON.

No. 816

COMMERCIAL PACIFIC CABLE COMPANY,
Appellant,

vs.

ALBERT S. BURLESON and NEWCOMB CARLTON.

BRIEF OF COUNSEL FOR APPELLANTS.

WILLIAM W. COOK,
CHARLES E. HUGHES,
As Counsel for Complainants' Appellants.

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CASES CITED.

Supreme Court of the United States,

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, Appellant, *vs.* ALBERT S. BURLESON AND NEWCOMB CARLTON.	No. 815.
COMMERCIAL PACIFIC CABLE COMPANY, Appellant, *vs.* ALBERT S. BURLESON AND NEWCOMB CARLTON.	No. 816.

BRIEF FOR APPELLANTS.

Statement of the Case.

These are appeals from final decrees entered in the District Court of the United States for the Southern Dis-

trict of New York on January 15, 1919, dismissing the complaint in each case upon the merits.

The two cases were heard together and in each the Court granted the motion to dismiss upon the same grounds. Save with respect to the corporation complainant, and the location of the cables of each complainant, the cases are here substantially upon the same record, and this brief, with the permission of the Court, will cover both cases. Unless otherwise noted, the references will be to the record in No. 815, the case of the Commercial Cable Company.

The bills of camplaint are for injunctions to restrain the defendants from interfering with the system of submarine cables owned by the complainants.

The Comemrcial Cable Company owns and operates a system of submarine cables in the Atlantic Ocean extending from the United States of America to Canada, Newfoundland, Azores Islands, the United Kingdom and France; and also a cable from New York to Cuba (Transcript of Record, No. 815, p. 2).

The Commercial Pacific Cable Company owns and operates a system of submarine cables in the Pacific Ocean extending from San Francisco to China, Japan and the Philippine Islands, its system being upwards of 10,000 miles in length (Transcript of Record, No. 816, p. 2).

On November 16, 1918, these cable systems of the two complainants, as well as the cable systems of other American cable companies, were seized by the defendant Burleson (Transcript of Record, No. 815, pp. 3, 4, Ex-

hibit C, p. 12). This was five days after the Armistice was signed and at a time when there was not the slightest basis for the seizure so far as the national security and defense were concerned—the only purpose for which the seizure of the cable systems had been authorized.

The complainants contend that the seizure was arbitrary, unwarranted and illegal; that the seizure was not authorized by Congress; that, if it could be deemed to be authorized by Congress in the circumstances in which the seizure was made, that such authority was not constitutionally conferred; that Congress could not delegate arbitrary power to make the seizure; that, if the seizure could otherwise be deemed to be within the competency of Congress, there was no proper provision for compensation, and that the seizure constituted a deprivation of property without due process of law and without just compensation, in violation of the Constitution of the United States.

The bills of complaint were originally against the defendant Burleson alone and were filed December 4, 1918. Being a non-resident of the District he could not be served with process. By a subsequent order of the defendant Burleson, dated December 12, 1918, Newcomb Carlton was named as his representative to assume the management and operation of these marine cable systems. Thereupon, the complainants amended their bills by bringing in Newcomb Carlton as co-defendant (*Id.* p. 13) and he was duly served (*Id.* p. 18).

Both defendants appeared and made motions to dismiss. The motions were upon various grounds, substantially that the possession taken through the defendants

Burleson and Carlton had been taken by the President pursuant to a resolution passed by Congress and that the Court had no jurisdiction to entertain the bills; and that the bills of complaint were insufficient in equity (*Id.* pp. 19, 20). There were also motions to strike out certain allegations of the bills of complaint (*Id.* pp. 21, 22), but these motions, in view of the disposition of the case upon the merits, were not considered below and need not be set forth (*Id.* p. 25).

The motions were heard by District Judge Learned Hand and were decided upon the merits. In his opinion, the District Judge stated that the two objections, to wit, (1) that the bills prayed for injunction against the United States, and (2) that they were in effect directed against the President, had not been considered (*Id.* p. 25). The bills of complaint were dismissed upon the ground that, although the allegations were sufficient to present a case, if it were justiciable, showing that there was no public necessity for the seizure, the bills of complaint could not be entertained because the controversy was *not* justiciable. The conclusion of the District Judge was thus stated (*Id.* pp. 30, 31, fol. 54):

> "It is true that if the issues were justiciable I am not prepared to say that the allegations of the bills would not present a case. Taken favorably, as I must take them, they say that the plaintiffs have given a service which in speed, in volume, in organization and in secrecy have been all that the property is capable of giving. I take this to include either separate operation or joint control. In any event, the defect if it were strictly a defect could be supplied by amendment. It is plain that

marine cables cannot be used for anything but the transmission of intelligence and such allegations seem to me unavoidably to present for determination whether the change in possession could improve the character of the service and so be necessary to the security and defense of the nation in the only respect in which it could assist in that defense. If that question were open to courts at all, I cannot think of any assertions which would better serve to open it. The defendants' argument that a trial might involve political considerations improper for disclosure, only goes to the propriety of any trial at all, not to the necessary inference from the allegations, if they be true. *If true, there was no public necessity; hence the issue is well framed, if it is justiciable. I hold that it is not.*" (Italics ours.)

The contention of the complainants as to the constitutional inadequacy of the provision for compensation was also overruled (*Id.* p. 31).

The complainants now appeal to this Court.

Constitutional Questions Involved.

The following constitutional questions are involved:

First: Whether the Judicial Power of the United States extends to this controversy.

The District Court has held that, under our system of government as defined by the Constitution of the United States, it does not.

Second: Whether Congress can constitutionally delegate to the President, and the President can exercise

through his appointees, an arbitrary power to take the property of a citizen as and when he pleases, that is, without any authority in the courts to inquire whether any ground exists warranting the seizure.

The bills of complaint deny this power. The decision of the District Court in effect sustains it.

Third: Whether proper provision has been made for compensation for the property seized so as to comply with the Fifth Amendment.

This question is suitably raised by the bills of complaint and has been passed upon by the District Court.

SUMMARY OF POINTS.

The Facts.

The averments of the bills of complaint stand admitted by the motions to dismiss.

On July 16, 1918, the Congress passed the following Joint Resolution (*Id.* pp. 9, 10):

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by

the President of the exchange of ratifications of the treaty of peace: Provided, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

We assume that the Court will take judicial notice of the fact that following the passage of this Joint Resolution, and on August 1, 1918, the President acting through the Postmaster General seized all the telegraph and telephone systems in the country. This was done when the War was at its height and the Nation, in its supreme effort, was possessing itself of every needed facility. But the marine cable systems were not seized—the obvious reason being that there was not the slightest necessity for their seizure, as their operation was under complete Government control and they were yielding their maxi-

mum service. In August, September and October, 1918, when the Nation was putting forth its full military strength there was no change in this respect.

On November 11, 1918, the armistice was signed. Of course, that did not end the legal state of war with Germany and Austria, but the conditions of the armistice were such that it ended the potency of the enemy as an armed foe. The enemy was prostrate, the terms of the armistice precluded the renewal of hostilities and the national security and defense were no longer in danger. This was officially stated by the President to Congress in announcing the armistice on November 11, 1918, when he said: "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it" (*Id.* p. 3).

Five days later occurred the seizure of the marine cable systems, which concededly there had been no need to seize during the period of actual hostilities. The proclamation of the President was dated November 2nd, but the bills of complaint aver that it was not proclaimed, announced, signed or countersigned until after November 11, 1918, and that no seizure of the cable systems was attempted until November 16, 1918 (*Id.* p. 4, fol. 7).

At one and the same time, and by a single act, the defendant seized all the marine cable systems owned or operated by American corporations. The seizure embraced the 10,000 miles of cable to China, Japan and the Philippine Islands (the Commercial Pacific Cable Company system), five Atlantic cables to Canada, Newfoundland and Great Britain, and to Cuba and Hayti (the Commercial Cable Company system), the cables leased to the Western Union Company, and also the

cables of the Central and South American Telegraph Company running to the Isthmus of Panama and thence down the western coast of South America and across the mountains to the Argentine Republic (*Id.* pp. 3, 5).

The bills of complaint allege that the seizure of the cable systems was arbitrary and that the assertion that it was necessary for the national security and defense was without any substance or basis of fact whatever (*Id.* pp. 4, 5). The ulterior motive is also averred in that the defendant Burleson proposed and intended to merge the complainant's "business, good-will, staff, organization, employees, plants and equipment with that of said Western Union Telegraph Company, so that the separate identity, business and good-will" of the complainant would disappear and that it would be "forced or persuaded to abandon competition hereafter and acquiesce in the defendant's plans for government ownership of the same, or an amalgamation of all cables in the Atlantic Ocean" (*Id.* p. 7). The illegality of the plan of the defendant Burleson is also alleged (*Id.* pp. 7, 8).

The admitted averments of the bills of complaint show unequivocally (1) the nature and use of the property seized, (2) the conditions of its operation, (3) the Government control, (4) the absence of any reasonable basis for a finding of necessity for the national security or defense as required by the Joint Resolution, (5) the ulterior motive of seizure, and (6) the absence of proper provision for compensation.

The property in question consisted of a system of submarine cables. Its nature limited its use. It was not property that could be put to a different use than that

to which it was being put. The submarine cables could be used only for transmission of intelligence and seizure by the Government could not alter this in any way.

With respect to the actual operation of the system, prior to the seizure, the bills of complaint allege:

(1) That "a full, adequate, complete, quick and correct cable service has been during the period of the war and still is being given by your orator on its cable system to the Government of the United States" (*Id.* p. 4, fol. 7);

(2) That "all Government messages are given precedence over all other messages" (*Id.*);

(3) That "there has been no complaint or occasion for complaint on the part of the Government in regard to the quick and accurate transmission of its messages" (*Id.* p. 4, fol. 8);

(4) That "your orator's cables are worked and operated to their utmost capacity by a most competent staff of officers and cable operators" (*Id.*);

(5) That "said service could not be increased or bettered" (*Id.* p. 5, fol. 8).

With respect to actual Government control prior to the seizure the bills allege:

(1) That "ever since the United States entered the present war the American ends of said marine cables of your orator have been and still are under the absolute control of the officials of the United States Government and particularly the control of the Director of Naval Communications" (*Id.* p. 5, fol. 8);

(2) That "nothing has been done by your orator relative to the operation of said cable lines without the knowledge and approval of said Director of Naval Communications" (*Id.*);

(3) That "every request and even suggestion made at any time by said Director of Naval Communications or his representatives, who were stationed and established in your orator's cable office in New York City, has been promptly complied with and carried out in every particular" (*Id.*);

(4) That "a most rigid censorship was established by the United States Government over your orator's cables and that your orator has heartily co-operated in said censorship" (*Id.*);

(5) That "all the demands and even requests of the Government of your orator in behalf of the national security and defense have been promptly, fully and cheerfully complied with by your orator, notably a request on October 29, 1918, by the State Department of the Government at Washington that your orator place at the disposal of that Department and the President a special cable across the Atlantic so that there might be instantaneous communication between the Government at Washington and its American representatives at Paris," that "thereupon your orator promptly set aside one of its trans-atlantic cables for that purpose and furnished a through circuit from Washington to Paris which has ever since been at the disposal of the State Department of the Government" (*Id.* p. 5, fols. 8, 9);

(6) That all of the thirteen Atlantic cables "have been and are devoted first to the transmission of Government messages relative to peace negotiations or any other Government business, and then press messages and commercial messages", and that the seizure of the cables by the Government "does not facilitate or better in the slightest degree the transmission of Government peace messages or any other messages," the cables having been worked to the full extent of their efficiency by most expert operators and staff (*Id.* pp. 5, 6, fol. 9). This is further shown by the fact that when the defendant Burleson seized the cable systems he directed that "all officers, operators and employees of the marine cable companies" should "continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment" (*Id.* p. 12, fol. 21).

Aside from the ulterior and illegal purpose to seize these properties, not because the seizure was "necessary for national security or defense", but to promote a policy of amalgamation and government ownership, it is apparent from the nature and use, and the government control, of the property prior to the seizure, that what was seized was really the complainant's moneys,—the income and profits of its property. The property, subject to the preferential use of the Government, was profitably employed for the sending of private messages, and the Government in seizing the cables thus unwarrantably took over the profits of a private business. The bills of complaint fully set forth the effect of the seizure with respect to the profits of the business, the

illegal delegation of the executive authority to fix compensation, the confiscatory plan of the defendant Burleson, and the constitutionally inadequate provision of the Joint Resolution itself with respect to compensation (*Id.* pp. 6, 7, fols. 10-12). These matters will be considered in the course of the discussion.

Points.

As constitutional questions are involved, the whole case comes here, and we shall discuss the constitutional questions with the other questions presented. We urge the following points:

(1) The Judicial Power of the United States extends to this controversy.

(2) The District Court had jurisdiction. The suit is not against the United States or against the President. The defendants are not immune from suit by virtue of the fact that they acted under the President's order.

(3) Congress could not delegate to the President arbitrary power to seize the property of the citizen as and when he may please without any authority in the courts to inquire whether there was any ground for the seizure.

(4) Congress did not attempt to delegate to the President arbitrary power, but circumscribed the authority by requiring the finding, and therefore a rea-

sonable basis for the finding, that the seizure was necessary for the national security or defense. This limitation imported that the national security should be endangered by the menace of the armed enemy. The seizure in question was evidently based on a misconstruction of the scope of the authority conferred.

(5) The seizure took place on November 16, 1918. The fact that the President's proclamation was dated November 2, 1918, does not preclude proof of the time of actual seizure, and the complainants are entitled to a judicial determination upon the question whether at that time the seizure was wrongful.

(6) The averments of the bills of complaint are amply sufficient to present the case of an arbitrary seizure outside the limits of the power conferred and the complainants are entitled to proceed with their suits.

(7) The seizure of the cables by defendants was not for the purpose of national security or defense, but for ulterior purposes contrary to law.

(8) No proper provision, and in fact no provision at all, has been made for the payment to complainants of just compensation for the possession and use of their cables, whether such compensation is fixed by the President or by the Court of Claims.

ARGUMENT.

FIRST: The Judicial Power of the United States extends to this controversy.

The District Court, in holding the controversy to be non-justiciable, necessarily denied that the judicial power of the United States, under Article III, Sections 1 and 2 of the Constitution, extended to this controversy. The conclusion of the District Court was based upon its conception of our system of government as defined by the Constitution.

Important as is this case to the complainants, the public importance of the issue is vastly greater. It involves our fundamental guarantees of liberty, for if the Court below is right, an avenue hitherto unsuspected has been opened to the broad exercise of arbitrary power. The property of the citizen has been invaded and it is difficult to over-estimate the serious consequences of a decision that under the Constitution there is no judicial power to determine whether the invasion is wrongful.

We submit that the reasoning of the Court below is fallacious, in view of the following considerations:

(1) The controversy is not of a political nature. It does not relate to the political status of Governments, or to any question of mere political competency. It is not addressed to the "framework and political character of the government" (*Luther* v. *Borden*, 7 How. 1; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118-150). As already stated, the controversy relates to *the invasion of the property of the citizen.*

It should also be noted that the controversy does not concern any activity of the President within the sphere of the Executive as defined by the Constitution. So far as the President's authority in this matter is concerned, he acts as the delegate of Congress. Congress, if competent to make the delegation, could have vested the authority directly in the Postmaster General or in any other officer, or in a new agency. The quality of the delegated power is not altered by the personality of the delegate. When the inquiry is, as it is here, whether the property of the citizen has been rightfully taken, we leave the *political* sphere and necessarily come to the *judicial* sphere where alone the rightfulness of the exercise of authority as against the citizen can be determined.

The decision was clearly pointed out in the opinion by the Chief Justice in delivering the opinion by the Court in *Pacific Telephone Co.* v. *Oregon, supra*:

> "The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."

(2) The fact that the controversy relates to action claimed to have been directed to a *war* end, does not remove the case from the sphere of the judicial power.

If the mere fact of an alleged war purpose makes a controversy inherently non-justiciable, the same reason-

ing would even more clearly apply to the action of military Commanders under the direction of the Commander-in-Chief. For while Congress may declare war and support war, it is to the President, as Commander-in-Chief, to whom is committed by the Constitution the direction of military operations. This broad authority, for the actual conduct of the war, may not be impaired, even by Congress itself (*Milligan's Case,* 4 Wall. 2, 139). And important as is the power of Congress to maintain the war, nothing is more important than the authority of the Commander-in-Chief "to direct the movements of the naval and military forces placed by law at his command and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States." (By Mr. Chief Justice Taney in *Fleming* v. *Page,* 9 How. 603-615.)

Yet, even in the theatre of war, when a military commander takes private property to prevent it from falling into the hands of the enemy or for the purpose of converting it to the public use, the urgent necessity which justifies this course is the subject of inquiry by the courts, which will determine for themselves whether the necessity exists. And if it is found not to exist, the military commander seizing the property is a trespasser and he cannot justify by showing the orders of his superior officer. The alleged war purpose, even in the actual conduct of campaigns, does not make the controversy non-justiciable or oust the courts of jurisdiction to inquire whether the property of the citizen has been invaded rightfully.

Mitchell v. *Harmony,* 13 How. 115.

In this leading case, in which Mr. Chief Justice Taney delivered the opinion, the authority of the Courts to inquire into the necessity, which in that case was the subject of a verdict by the jury, was definitely sustained. Mr. Chief Justice Taney said (*Id.* pp. 134-136):

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.
>
> "But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.
>
> "In deciding upon this necessity, however, the state of facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the

peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good. * * *

"Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

"The case mentioned by Lord Mansfield, in delivering his opinion in Mostyn *v.* Fabrigas, 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudible one, and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law, and the officer who executed the order was

held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

"This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

And, in stating that instructions of a superior officer would not justify the military commander in case of trespass, by reason of the absence of necessity, Mr. Chief Justice Taney said (*Id.* p. 137):

"If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. *Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist.* Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, *it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior.* The order may palliate, but it cannot justify." (Italics ours.)

The case of *Mitchell* v. *Harmony* shows conclusively that the controversy does not become inherently non-justiciable, because of an alleged war purpose.

(3) It is also established that a controversy with respect to the lawfulness of a seizure of property is none the less justiciable because the seizure was made by those who acted under the direct instructions of the President.

Little v. *Barreme*, 2 Cranch. 170.

In this case it was held that instructions from the President to a naval officer to seize property illegally did not protect the officer from payment of damages. The officer had seized a Danish brigantine upon suspicion of violating the Act of Congress, usually termed the non-intercourse law, passed on February 9, 1799 (4 Stat. 244). The fifth section of that Act authorized the President to give instructions to the commanders of the public armed ships of the United States to stop and examine vessels of the United States in described circumstances. The President issued explicit instructions, which, however, were found to go beyond the authority conferred by the Act of Congress. Mr. Chief Justice Marshall, in delivering the opinion of the Court, said (*id.* pp. 178-179):

> "These orders given by the executive under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this

misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was *American,* would excuse the captor from damages when the vessel appeared in fact to be neutral.

"I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. * * * I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. *But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.*" (Italics ours.)

The same point received thorough and final consideration in the case of *United States* v. *Lee,* 106 U. S. 196, which has been followed in a long line of authorities.

The case was ejectment. The defendants were military officers, holding the property at Arlington, Va., under the direction of the President, as a military station and a national cemetery, and it was alleged not only that the defendants were acting under the direction of the Executive Department, but that their possession was the possession of the United States. Accordingly, the Attorney General appeared, insisting that the Court had no jurisdiction and that the action should be dismissed. As was said by Mr. Justice Miller, delivering the opinion of the Supreme Court:

> "The defence stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power" (*id.* p. 220).

It was a case similar to the one at bar. It was not a case of a cabinet officer or other administrative officer acting under authority of Congress given to such officer directly. The officers, defendants there, were acting under the direct authority of the President. They claimed no personal interest. This Court sustained the jurisdiction, holding that the Circuit Court was competent to decide the issues between the parties that were before it, and the Circuit Court having found that title was in the plaintiff and having rendered judgment against the defendants, its judgment was affirmed. The Court, by Mr. Justice Miller, said (*id.* pp. 219-221):

> "What is that right as established by the verdict of the jury in this case? It is the right to the

possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, *acting under the orders of the President,* have seized this estate, and converted one part of it into a military fort and another into a cemetery. * * *

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. * * *

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, *because the President has ordered it and his officers are in possession?*

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful pos-

> sessor can say successfully to the court, *Stop here, I hold by order of the President, and the progress of justice must be stayed.*" (Italics ours.)

It will be observed that in this case the Attorney General of the United States appeared *in limine* in the Circuit Court to challenge the jurisdiction and that the plaintiff's demurrer to his suggestion was sustained (*id.* p. 198).

The effect of the decision in *United States* v. *Lee* was clearly set forth in *Tindal* v. *Wesley*, 167 U. S., 204, 213, where the Court said:

> "The leading case upon the subject is *United States* v. *Lee*, 106 U. S. 196 * * * What was the case of *United States* v. *Lee*? By direction of the Executive Department of the Government proceeding, as was supposed, under legislative authority, Kaufman and Strong, as officers and agents of the United States, held possession of certain real estate in Virginia known as Arlington and constituting a National Cemetery in which were interred the remains of Union soldiers. * * * The action proceeded upon the ground that the legal title and right of possession were in the plaintiff."

(4) It seems that the conclusion of the District Court that the controversy was not justiciable was reached upon the theory that Congress, without making any finding of necessity itself, could delegate to the President a sweeping authority to take the property whenever he pleased without any power in the courts to make any inquiry whatever into the propriety of the seizure (Transcript of Record, pp. 26, 27).

The District Judge stated that he was not concerned with the "scope of the Court's inquiry", for "*if no inquiry whatever is possible,* its scope is irrelevant" (*Id.* p. 26). It was recognized that even under the broadest latitude of executive discretion, hitherto deemed compatible with the genius of our institutions, as, for example, in such cases as *Field* v. *Clark,* 143 U. S. 649, *Buttfield* v. *Stranahan,* 192 U. S. 470, and *Union Bridge Company* v. *United States,* 204 U. S. 364, there was still an important field for judicial inquiry to protect the citizen from the invasion of his liberty and property in the mere exercise of arbitrary power (*American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U. S. 88, 91). But the District Court denied, in the present case, any degree of justiciability (Transcript of Record, p. 26).

It may be said that, while thus denying justiciability, the Court below did in fact treat the controversy as a justiciable one, and actually decided it. For the Court construed the Joint Resolution of Congress so as to eliminate any condition whatever, so far as the necessities of the national security and defense are concerned, and so as to leave the seizure to the executive will no matter how arbitrarily it might be exerted. Then, having thus construed the Joint Resolution, the Court below construed the Constitution as justifying such a delegation of power by Congress. The fundamental question thus decided, however, is not one of mere words, but, as we view it, of vital consequence to the Nation,—perhaps more so at this period in our history than at any other. We shall later review the authorities relating to the

permissible delegation of power by Congress, but the present purpose is simply to direct attention to the view entertained by the Court below,—in support of which no authority is adduced.

It is sought to take the case out of the familiar principle as to delegation by stating that Congress is acting in the administrative rather than the legislative field. We are unable to see that this is a real distinction, and not a mere form of words. The suggestion seems to come from the recognized power of Congress appropriately to fix standards for administrative action and allow administrative agencies to fill in the details or to pass upon questions of fact. But this authority, as is abundantly shown (*Infra*, pp. 38, etc.), never permits the delegate of Congress to exercise a mere arbitrary power. The delegation implies findings properly made and having a reasonable basis.

The important question is whether Congress can *divest itself* of the power delegated to it by the Constitution, and, escaping its own responsibility, place an irresponsible power in someone else, whether it be the President or another. It seems to be thought that as the President has certain constitutional functions as the Executive, it is competent for Congress to annex to these functions certain other powers, and, because the former are political, to permit him to exercise the latter as he pleases, no matter how arbitrary that exercise may be. The *non sequitur* is apparent. For what the President does by virtue of his constitutional prerogatives is one thing, what he does by virtue of a delegation from Congress is quite another. The latter derives its sole force

from that delegation, which Congress cannot make except in the constitutional manner, and that manner is certainly not through a divestiture of its responsibility and the placing of an uncontrollable power in another, leaving the citizen without any opportunity to question even the most high-handed attack on his personal rights.

The statement that Congress is exercising an administrative instead of a legislative power we submit, carries one no whit farther, for if the power is vested in Congress it is apparent that it cannot, under the Constitution, be exercised by anyone else. If, under the authority of Congress, another does exercise a proper degree of authority in such a case, it must be because that exercise is properly related to the performance by Congress of its own function. And to say that by virtue of the President's constitutional functions Congress, disclaiming any appropriate determination of its own, may annex to these functions an arbitrary power as to matters within its own sphere is simply to permit Congress to amend the Constitution and to place the power delegated to it in another's hands. A doctrine more destructive of our system of government it would be difficult to imagine.

It has been urged that, in exercising the power of eminent domain, Congress is the judge of the necessity of the taking, if it be for a public use, and it has been said that the determination of Congress as to the necessity is not reviewable (*Shoemaker* v. *United States,* 147 U. S. 282, 298; *United States* v. *Chandler-Dunbar Company,* 230 U. S. 53, 65). A case where the taking, however, was palpably arbitrary has not been passed upon by

the courts; and it may be observed that in *United States* v. *Chandler-Dunbar Company, supra,* this Court thought it important to point out that the taking there challenged, and authorized by Congress, was not arbitrary in its extent (*Id.* p. 66).

But the question of the conclusiveness of such a determination by Congress is not involved in the present case, for Congress *has made no such determination.* Congress has not said that it was necesary for the national security or defense to take the marine cable systems.

The seizure made by these defendants is based *not* upon a determination by Congress of its necessity for the national security and defense, but solely upon the action of the delegate of Congress, and the point of the decision below is that, in case of such a delegation, there is no authority by which the action of the delegate, or of those who act under the delegate, can be the subject of judicial inquiry, no matter how arbitrary and oppressive that action may be. Even if it be assumed that Congress could make the determination, its authority to make it furnishes no ground whatever for the decision that it can delegate the authority to make it, so as either to subject it to caprice or to make the delegation the vehicle of an opportunity to use it for an ulterior purpose having no reference to the necessity to which the Resolution refers. Such a view has not yet been countenanced so far as we are advised in any decision of this Court.

The power to make war, and to wage it successfully, is essential to the preservation of the Union. But it is not

the only power that is essential. The power to regulate interstate commerce is also absolutely essential to the maintenance of the integrity of the Union. Without it we could have no Union.

Yet it is well established that if Congress delegates an authority in the exercise of its power to regulate interstate commerce, the question whether that authority is arbitrarily exerted without any proper basis, is a justiciable question.

Interstate Commerce Commission v. *Louisville & Nashville Railroad,* 227 U. S. 88, 91.

In this case the Court said, with respect to the Interstate Commerce Commission:

> "*A finding without evidence is arbitrary and baseless.* And if the Government's contention is correct, it would mean that the Commission had a power possessed *by no other officer, administrative body, or tribunal under our Government.* * * * Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of *all arbitrary exercise of power.*" (Italics ours).

Can all the fundamental guaranties protecting the property of the citizen be escaped by making the President the delegate of Congress and thus removing the action of his subordinates from judicial scrutiny?

If so, there is no reason why Congress should not invest the President with the power to regulate all railroad rates, and let him provide for the "executive administration" of the authority through a commission which he creates. In short, all the arbitrary conduct of officers

against which the citizen may now be protected, can be rendered immune from attack by having the authority in question delegated to the President and by him to his subordinates.

In considering this question it must not be forgotten that, while war is war, there are all sorts of wars. We have emerged from a world war, but every war is not necessarily of the same magnitude. We may have a war in Hayti or in San Domingo, or an affair with some other small country involving no exigency of a highly serious character.

Yet if the mere fact of war authorizes a delegation by Congress of an authority to the President, which makes the action of his subordinates unreviewable by the courts, no matter how palpably arbitrary or capricious it may be, then it would apply just as much in the case of a small war as in the case of a big one.

Let there be a state of war; then anything can be done, regardless of its relation to the emergency. A compliant majority in Congress, escaping its own responsibility, can place an uncontrollable power in the hands of the executive, and neither his action nor that of his subordinates in asserted exercise of the power can be the subject of judicial cognizance. There is no danger that necessary administrative action will be crippled by preserving the judicial authority to prevent the exercise of arbitrary power. The danger is the other way.

We may quote the impressive words of the opinion of this Court in *Ex-parte Milligan,* 4 Wall. 2, 120, 121:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

SECOND: The District Court had jurisdiction.

The defendants contested the jurisdiction of the Court below upon the ground that the possession of the cables is that of the United States and that the seizure was made under direction of the President.

The District Judge did not pass upon these questions (Transcript of Record, p. 25). That is, he did not consider the question of jurisdiction of the Court as distinguished from that of the justiciability of the controversy.

It is clear, however, assuming the controversy to be justiciable, that the District Court did have jurisdiction. The answer to the defendants' contentions is that the United States is not sued and the President is not

sued. The action is against these defendants, Burleson and Carlton, who, it is alleged, have made an illegal seizure.

The question is the same as that presented in *United States* v. *Lee* (106 U. S. 196), already cited (*supra*, p. 23). It was there claimed that the possession of the defendants was the possession of the United States. Plaintiff, however, said to the defendants, "This is my property and I find you here." He said, "I am not suing the United States or the President, but I am asserting against you, the defendants, who are wrongfully withholding my property from me, that you are guilty of that wrongful withholding and I am asking the judgment of the Court that your possession is wrongful and that the title is in me". This contention was sustained, and the suggestion of the Attorney-General who challenged the jurisdiction of the Circuit Court was overruled.

In *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452, Mr. Justice Miller said, with respect to the result of the decision upon this point:

> "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence, he must show that his authority was sufficient in law to protect him. * * *
>
> "To this class belongs also the recent case of *United States* v. *Lee*, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants,

> Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence."

In *Tindal* v. *Wesley*, 167 U. S. 204, an analogous principle was applied to a case in which one of the defendants alleged that the property in question was in his possession only as Secretary of State of South Carolina. The jurisdiction of the Court, despite such a claim, was sustained. After referring to the claim of the Attorney-General in the *Lee* case, and reviewing at length the opinion delivered by Mr. Justice Miller, this Court summed up its conclusion as follows (*Id.* p. 218):

> "We have made these extracts from the opinion of the court in the *Lee case* because the reasons there assigned for the conclusion reached control the determination of the present case. If a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the Government, we cannot perceive how the present suit can be regarded as one against the State merely because the defendants assert a right of possession in the State through them as its officers and agents.
>
> "The essential principles of the *Lee case* have not been departed from by this court, but have been recognized and enforced in recent cases."

Of course, it cannot be said that the Court in such a case as *United States* v. *Lee* can oust the defendants and

establish as against them the plaintiff's right to recover his property, and yet cannot enjoin the defendants, where the property consists of cables which they have wrongfully seized.

Counsel for defendants endeavor to break the force of these decisions by reference to the case of *Belknap & Schild*, 161 U. S. 10 and similar cases.

The case of *Belknap* v. *Schild, supra,* fully recognized the principle of the *Lee* case, but in the *Belknap* case the question related to the maintenance of a caisson gate which had been erected and was being used by the United States in a navy yard. That the United States had title to the caisson gate was admitted and this fact distinguished it from the *Lee* case, as was pointed out in *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, where the same question was involved, as there the United States was the lessee of the machines in use.

Similarly, in *Oregon* v. *Hitchcock,* 202 U. S. 60, and in *Naganab* v. *Hitchcock,* 202 U. S. 473, the suit was brought to restrain the Secretary of the Interior from allotting lands, the title to which was in the United States. Again, in *Louisiana* v. *Garfield,* 211 U. S. 70, the title was in the United States and had never passed; the only doubt as to its passing was dependent upon the applicability of the statute of limitations defining the period in which the United States could sue to vacate a patent. So, in *Goldberg* v. *Daniels,* 231 U. S. 218, the United States was the owner of the vessel, the delivery of which was sought to be required.

In these cases the property was *owned by the United States* and of course the United States was a necessary party. Nor is the present case within the principle ap-

plied in such cases as *Louisiana* v. *McAdoo*, 234 U. S. 627 and *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, that *mandamus* will not lie to control the exercise of the discretion vested in an officer of the Government. So in the recent case of *Wells* v. *Roper*, 246 U. S. 332, where it was sought to restrain the First Assistant Postmaster General from annulling a contract, there was, as the Court pointed out, no question of the authority of the officer involved.

Where, however, one seizes property unlawfully, he cannot protect himself by asserting that he is in possession on behalf of the United States or that the United States makes a claim of title. This is the point in the *Lee* case. The action is against the individual for his wrongful conduct in seizing the property. The suit is not against the United States and the complainant is entitled to have the propriety of the defendants' action determined.

> See *Hopkins* v. *Clemson College*, 221 U. S. 636, 643, 644.

Nor, in the case of an injury threatened by his illegal action, can the officer claim immunity from injunction process. The principle applies not only with respect to State officers seeking to enforce unconstitutional enactments, but applies equally to a Federal officer acting in excess of his authority or under authority not validly conferred.

> *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620.
>
> *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109, 110.

It is equally clear that the suit *is not against the President*. What has been said with reference to the question of justiciability applies here. As pointed out, the case does not involve action by the President within his political sphere as defined by the Constitution (*Marbury* v. *Madison*, 1 Cranch. 137, 165, 166). There is here no question of process against the President or of the inviolability of the President's person (*Mississippi* v. *Johnson*, 4 Wall. 475). The suit is not against the President at all. The suit is against these defendants; the process of the Court will run against them and there is no ground for the conclusion that it could not or would not be executed, any more than there is ground for such a conclusion in any case of process issued from the court against any individual or, for that matter, any departmental head in case of his going beyond his authority.

The cases of *Little* v. *Barreme, supra,* and *United States v. Lee, supra,* dispose of the contention that the suit is directed against the President because authority is asserted under his order. The doctrine of these cases has been affirmed in recent decisions of this Court.

Hopkins v. *Clemson Agricultural College,* 221 U. S. 636, 644.

Philadelphia Co. v. *Stimson,* 223 U. S. 605, 619, 620.

THIRD: Congress could not constitutionally delegate to the President arbitrary power. The complainants by their bill averred that if the Joint Resolution of Congress, properly interpreted, had the effect of reposing in the President arbitrary power, the Joint Resolution was invalid, as it was beyond the competency of Congress to vest the President with such an authority.

The recognition of the power of Congress to delegate authority has never gone so far as to justify the delegation of arbitrary power. It has been well said that "when we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 370). In the field of authority delegated by Congress, there is always the condition of delegation that arbitrary power shall not be exercised and compliance with this condition is always the subject of judicial inquiry. The principle upon which Congress is permitted to delegate authority involving the exercise of discretionary power, in order that legislation may be practicable, is that Congress legislates and that its delegate administers within defined limits. The establishment of appropriate limitations conditions the authority to delegate, and delegation without limits is unconstitutional. If it is asserted by defendants' counsel that Congress has actually delegated to the President a power

the exercise of which is unreviewable and uncontrollable, however arbitrary such exercise may be, counsel thereby destroy the validity of the delegation itself.

The principle of delegation is clearly stated in the leading case of *Field* v. *Clark*, 143 U. S., 649, where many instances of delegation of power to the President are reviewed. There, the President was authorized by the Tariff Act of October 1, 1890, to suspend the free introduction of certain commodities when he was satisfied that any country producing such articles imposed duties or other exactions upon the agricultural or other products of the United States which he might deem to be reciprocally unequal or unreasonable. It was pointed out that Congress cannot delegate "legislative power" and that the suspension of the free list, there under consideration, "was absolutely required when the President ascertained the existence of a particular fact" (p. 693). The delegation was necessarily a limited delegation. There was not a mere substitution of legislative authority, but there was a definite thing which was to be done, implying, despite the discretion involved, the duty to do the thing upon a reasonable determination with respect to the existence of a particular state of facts. The Court said (*id.* pp. 692, 693):

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution. The Act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. * * * Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words '*he may deem*', in the third sec-

tion, of course, implied that the President *would examine the commercial regulations of other countries* producing and exporting sugar, molasses, coffee, tea and hides, and *form a judgment* as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the *fact* that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his *duty* to issue a proclamation declaring the suspension as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President *ascertained the existence of a particular fact,* it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws." (Italics ours.)

The proper distinction was said to be this (p. 694):

> "'The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power *to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.*'" (Italics ours.)

The authority to ascertain a state of facts necessarily implies that there shall be a reasonable judgment based upon facts. In acting without such a judgment, the officer transcends the delegated power. For example, in *Field* v. *Clark,* it is manifest that there would have been no

justification whatever for a suspension of the free list, on the suggestion that there was discrimination, as against a country whose Tariff Act was like our own.

Again, in *Buttfield* v. *Stranahan,* 192 U. S. 470, a delegation was upheld which related to the establishing of administrative standards in order to prevent the importation of impure and unwholesome teas. In reaching this conclusion, however, the Supreme Court repelled the suggestion that there was any delegation of arbitrary power. The Court said (*id.* p. 496):

> "The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute."

So, also, in *Union Bridge Co.* v. *United States,* 204 U. S., 364, with respect to the broad powers conferred upon the Secretary of War in relation to obstructions to navigation, the Court, after a review of the authorities, concluded (*id.* pp. 385, 387):

> "It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the

principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers strictly legislative or judicial in their nature or which must be exclusively exercised by Congress or by the courts.

* * * * *

"To this may be added the consideration that Congress, by the act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as *arbitrary.* * * * In the present case all the provisions of the statute were complied with. The parties concerned were duly notified and were fully heard. Nor is there any reason to say that the Secretary of War *was not entirely justified, if not compelled, by the evidence* in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted." (Italics ours.)

And it was further recognized that in any case where the means employed for the purpose Congress had in view, were "arbitrary and unreasonable, beyond the necessities of the case," the judiciary would disregard "mere forms and interfere for the protection of rights injuriously affected by such illegal action" (p. 397).

Even in the exercise of the authority broadly conferred for the purpose of excluding certain aliens, or persons brought in for immoral purposes, in the execution of the policy of Congress, it is well established that there can be no resort to arbitrary power by the immigration officials and that there must be reasonable pro-

cedure and some proper basis in evidence for the finding warranting exclusion.

Lewis v. *Frick*, 233 U. S. 291, 297.

See also, *Tang Tun* v. *Edsell*, 223 U. S. 673, 675.

Gegiow v. *Uhl*, 239 U. S. 3, 9.

There has been no more important delegation of power by Congress in recent years than that confided to the Interstate Commerce Commission, in which considerations of policy are interwoven with the varied facts which are to be examined and upon which findings are to be made, but while the Supreme Court has refused to review the findings of the Commission where they rest upon evidence and the proceedings have been conducted in a suitable manner, it is equally clear that arbitrary procedure is not within the authority conferred by Congress. And findings without evidence are "arbitrary and baseless". Accordingly, when it was contended that the determination of the Commission must be accepted on its mere assertion that the Commission had acted upon evidence, when in fact it appeared that the finding was without evidence to support it, the contention was overruled and the principle of limited delegation emphatically reaffirmed.

This ruling was made in the case of *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 91, where this Court denied the authority of the Commission capriciously to make findings by "*administrative fiat.*"

It necessarily follows that the limitations which adhere to delegations of power by Congress, will be recog-

nized and enforced by the Courts. It is not enough that the officer exercising the delegated authority *recites* that the conditions of his exercise of power have been met. The courts go behind the mere recital, for otherwise protection is impossible and arbitrary power is unchecked. Nor is it enough that the officer acts in good faith, if he is mistaken as to the limits of his authority. Whether or not he acts in good faith, he must respect these limits. If, upon the facts, the case is not within the delegated authority, the officer cannot justify his action by any assertion nor prevent the Court from reviewing his action and giving the relief to which the injured party is entitled.

These principles are established beyond contradiction by the leading case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

There, by Section 3929 of the Revised Statutes, the Postmaster General was authorized to interdict the use of the mails "upon evidence *satisfactory to him* that any person is engaged" in promoting a fraudulent scheme. Acting under this statute the Postmaster General made a formal order in which he recited that it had been made to appear, "*upon evidence satisfactory to him,*" that the American School of Magnetic Healing was using the mails for the purpose of obtaining money through false and fraudulent pretenses in violation of the act of Congress. Accordingly, upon this alleged basis, and exercising the authority conferred in the broadest terms, the Postmaster General prohibited to the complainant the use of the mails.

The complainant challenged this action and the question was whether the Court could review it, despite the discretion reposed by Congress. The Court examined

the facts, which were admitted by the demurrer and reached the conclusion that the position of the Postmaster General was untenable. It appeared that the "*fraud*", of the commission of which he was satisfied, consisted in representations with respect to the power of the mind in healing the ills of the body without recourse to medicine. The case was one of the expression of opinion and not of the commission of a fraud. The Court said, in substance, to the Postmaster General: "You had no right to be satisfied that this was a fraud, for it was not a fraud. You were outside the charter of your power".

Conceding, for the purpose of the case, the full jurisdiction of Congress over the mails, and the wide range of discretion given to the Postmaster General, the question necessarily still remained open for a judicial determination whether the Postmaster General had acted within the sphere of his authority. As the Court said (*id.* pp. 109, 110):

> "His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, *arguendo,* that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, *based upon some evidence to that effect,* would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the de-

termination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. * * * To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld." (Italics ours.)

While it was held that the Postmaster General was mistaken in his view of the scope of his authority, this conclusion was reached necessarily after a consideration of the facts which stood admitted by the demurrer. The point is that although the statute provided that the Postmaster General might interdict the use of the mails when he was satisfied that they were used to promote a fraudulent scheme, his satisfaction had to have a reasonable basis. Despite the broad language of the grant of

power, he could not give himself authority by merely asserting his satisfaction or stating that the scheme in his judgment was a fraudulent scheme. The facts being shown, and admitted by the demurrer, the conclusion followed that he had no right to be satisfied and hence had no authority.

The condition that his action should not be arbitrary was essential to the validity of the delegation of power.

The principle of the McAnnulty case has been repeatedly recognized.

See

> *Philadelphia Co.* v. *Stimson,* 233 U. S. 605, 620.
> *Degge* v. *Hitchcock,* 229 U. S., 162, 171.

In *Degge* v. *Hitchcock, supra,* the court said, referring to decisions of the Postmaster-General in a field as broad as that of any administrative officer:

> "Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for had there been *an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred,* they had the right to apply for and obtain appropriate relief in a court of equity. *School of Magnetic Healing* v. *McAnnulty,* 187 U. S., 94. *Philadelphia Co.* v. *Stimson,* 223 U. S., 605, 620." (Italics ours.)

Applying these principles to the present case, it is manifest that the Joint Resolution, if susceptible of two interpretations, should be interpreted so as to save it from constitutional infirmity (*United States* v. *Delaware & Hudson Co.,* 213 U. S., 366, 407; *Lewis Publishing Co.* v. *Morgan,* 229 U. S., 311). If it can be sensibly construed so as to give a delegated power within limits clearly

recognized, it should be so construed, as to attempt to make it a vehicle for an authority so wide as to assign to it no bounds which could be ascertained and enforced in a judicial proceeding would be to destroy its constitutional validity.

FOURTH: Congress did not attempt to delegate to the President arbitrary power, but circumscribed the authority by requiring the finding, and therefore a reasonable basis for the finding, that the seizure was necessary for the national security or defense. This limitation imported that the national security should be endangered by the menace of the armed enemy. The seizure in question was evidently based on a misconstruction of the scope of the authority conferred.

The Joint Resolution provides (Transcript of Record, pp. 9, 10):

> "That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace."

The Resolution thus defines limitations (1) as to the time when, and the circumstances in which, the described properties might be seized; and (2) as to the duration of the possession, control and operation after the seizure.

These limitations are distinct. Before the properties can be held for the prescribed time, they must be lawfully seized, and they cannot be lawfully seized unless the seizure is found to be "necessary for the national security or defense".

We are not here concerned with the length of time that properties can be held after a valid seizure. It is manifest that different considerations might apply as to the duration of the Government's possession from those which would govern the seizure itself. In the former case, there may be considerations as to winding up the governmental operations, as in the case of the railroads, requiring time and arrangements for the resumption of possession by the owners. Congress in this Joint Resolution as to telegraphs, telephones and marine cables, set a definite limit to the period of the Government's possession, and this limit, of course, applies where possession has been taken rightfully. If the original seizure is wrongful, there is no warrant to hold for any time. And because properties, duly taken, might be held during the duration of the war and until the proclamation of the ratification of the treaty of peace, it does not follow that properties could be taken at any time until peace was declared, regardless of any existing necessity.

What then are the limitations of the right of seizure? They are (1) that it must be "during the continuance of the present war", and (2) that it must be deemed to be "necessary for the national security or defense". Both

these conditions must be observed. It will not do to say that Congress authorized the President to seize the cables at any time during the War,—so long as a mere state of war existed; and that, therefore, if there was a legal state of war at the time of the seizure, the seizure was authorized.

This is plainly not the fact. But the argument is significant, for it directs attention to what Congress would have done had it meant to give the authority for which the defendants contend. If Congress had intended to permit the President to seize the marine cables at any time during the mere existence of a legal state of war, regardless of the necessities of the national security and defense, how easy it would have been to say so! The clause would then have read:

> "That the President during the continuance of the present war is authorized and empowered to supervise or to take possession, etc."

But Congress did not so provide. Congress added the words:

> "whenever he shall deem it necessary for the national security or defense".

These were qualifying words. They meant something. The defendants in effect seek to strike them out of the Resolution and to read it as though a mere state of war was enough to authorize the seizure. This is to change the authority in order to justify a different and an arbitrary power.

The question is, What is meant by the words *"necessary for the national security or defense?"*

It is at once clear what these words do not mean if

they are to receive a reasonable interpretation in the light of the context and the known exigency. Much of the argument of the defendants, and of the opinion of the Court below, is addressed, as we view it, to matters which the authority was not intended to embrace. Thus, it is urged that, after all danger to the national security and defense had ended, there might be various military operations. Large forces might remain to be transported and important administrative concerns might require attention.

But Congress did not give authority to seize these properties merely because of extended governmental operations or administrative concerns. The authority was not granted merely because there might be movement of troops, transportation, demobilization, etc. All these military or administrative matters might conceivably be exigent after the treaty of peace. Congress did not say that the seizure might be made whenever it was deemed advisable for any supposed governmental convenience. Had Congress intended to confer any such broad authority, even during the continuance of a state of war, certainly the qualifying and controlling clause as to the necessity for "the national security or defense" would have been omitted.

Equally beside the mark is the argument for the seizure of the cables as an aid to peace negotiations. As is abundantly shown by the averments of the bills of complaint, there was no need of the seizure even for this purpose. But Congress gave no such authority. Congress did not say that the seizure could be made if "deemed to be necessary for the conduct of peace negotiations" or if deemed to be necessary for *any* purpose during the duration of a state of war. It is idle to con-

jure up all the possibilities which are conceived of as indicating a possible object of the seizure of the cable systems. We have a specific Resolution, imposing a definite limitation of authority, and we submit that this limitation should be enforced. The seizure was authorized only if deemed to be "necessary for the national security or defense."

These words are not to be interpreted as a vague formality. They are the essence of the grant. Congress would never have made the grant otherwise. And the words are not to be emasculated by drawing into them every supposed object which might conceivably be related to the public welfare. Such a construction would permit the authority to embrace every variety of policy. The clause is not to be eliminated by construction,—by making its content so broad as to render it meaningless.

Congress was not dealing with nebulous hypotheses of national welfare; Congress was not empowering the President to indulge in general speculation with regard to the promotion of national prosperity or national prestige. There was no thought of giving this extraordinary power to the President to seize these varied instrumentalities of communication in pursuance of a mere conception of some policy of unification or of Government ownership or of general betterment. When this authority was conferred we were in a state of actual war and we were marshalling our forces to overthrow an enemy threatening us, unless defeated, with conquest. The "national security or defense" had a very definite meaning to Congress, and we should wholly overlook the conditions at the time of its passage, the natural intendment of its words, and the necessity of suitable limitations in defining its grant of power, if we give to

these words any wider meaning than is conveyed by the sense of national safety which should be rendered secure from the attack of arms.

Congress was dealing with the exigency of war. The power was to be exercised during the continuance of the war and if deemed to be necessary for the national *security* or *defense*. What could be clearer? The joint Resolution contemplated *a case of impending danger to the national security due to the actual conduct of the War*.

In order that the seizure should be deemed to be necessary for the national security or defense, it must appear that the national security was *endangered*. The limitation contemplated that the national security or defense should be in danger by reason of the exigencies of war and the menace of the enemy. The authority was granted in the face of war, and when we speak of our national security as threatened by war we mean *the menace of the armed enemy*.

Congress was not dealing with questions of mere military administration, or negotiations, or governmental activities of any sort, in the absence of danger from the foe. Unless the national security or defense was in danger, the seizure was *not* necessary for the national security or defense. This is the unescapable test.

Finding this to be the natural and fair import of the Joint Resolution, we return to the point that the clause did not confer an arbitrary power,—to create a necessity by "*administrative fiat*". The finding of danger to the national security or defense, that is, that the action was "*necessary*" for the national security or de-

fense, was a *condition precedent* to the exercise of the authority conferred. That finding, in accordance with established principle, was not to be an arbitrary fiat or a mere assertion. It was not to be a finding without evidence to support it. It was necessarily to be, if the authority was to be rightly exercised, a reasonable judgment permitted by the facts in a situation in which the national security could fairly be deemed to be actually endangered by the continuance of the war and the menace of the foe.

The grant of the authority implied a *duty,* not a mere privilege to indulge caprice or to foster a general policy. The duty was to ascertain the facts and to act in accordance with the facts. It was the duty of the President to act under the Resolution if the facts justified it, and he had no power to act in the absence of the duty to act. Whether the matter be regarded from the standpoint of duty or power, the necessity of a reasonable judgment is the controlling factor. This reasonable judgment would thus be a finding upon evidence, and upon the facts disclosed; a finding without evidence, without any basis for a determination of necessity, would be the mere fiat of caprice, and, assuming its entire good faith, would simply amount to a mistake of power.

As we have seen, the *recital* of necessity is not sufficient. The same principle is involved as was applied in the *McAnnulty* case, *supra,* where the facts were stated in the bill, and on the allegati[illegible] there was no sufficient basis for the ruling of the Postmaster-General. Hence, despite his recital of satisfaction with the evidence, his judgment that he was entitled to act on such a state of facts was nothing but a mistake of law.

So, in this case, if the view was entertained that the

cable systems could be seized under the Joint Resolution for any purpose of governmental policy,—merely because the legal state of war had not been ended by a treaty of peace, and the cessation of the contemplated danger to the national security or defense was ignored,—it would be a mere mistake of law as to the meaning and scope of the authority conferred. As in the *McAnnulty* case, where the facts showed—despite the recital to the contrary—that there was no case within the authority granted by Congress and that the action taken was evidently based on a mistake of law, so here the misapprehension is equally clear. An authority granted for one purpose has been used for another. The facts are plain and we simply ask that the law be enforced.

As the Joint Resolution defined a condition precedent to the exercise of the authority conferred, and as this condition was a finding that it was necessary for the national security or defense, which finding must have a basis in the facts of the situation as they existed at the time of the seizure, it necessarily follows that the Court was entitled to inquire whether this limit of authority had been exceeded.

Hence, the Court below should have entertained these bills of complaint.

The District Judge in his opinion in the court below says that if the court has power to review the action of the President the "government becomes in the final analysis not one of laws but of courts" (Transcript of Record, p. 27, fol. 49). That statement of Judge Hand includes, of course, the review by the courts of the action of representatives of the President such as these two defendants in these two cases. We challenge any such doctrine. We assert on the contrary that it is a most dan-

gerous doctrine indeed, that the courts have no power to stop subordinate officials of the Executive Department from usurpations of power. That doctrine is exactly what Mr. Justice Miller denounced in the case of *United States* v. *Lee*, referred to above.

We are aware that the President in acting as Commander-in-Chief has all the powers recognized by the usages of war, but when he does not act by martial law, he is governed by the Acts of Congress, and any executive orders, not authorized thereby, are no warrant of power, or cover of protection. Martial law and civil law have not in this country lost their identity, and while the acts complained of by these complainants may have been military in spirit and in eventual purpose (which, however, the complainants deny in their complaints), yet they were civil in their essential character and were subject to inquiry and review by the judiciary. The doctrine that the judiciary has no inherent power to stop the Executive Department from usurpations in the exercise of delegated power, the usurpations being in the exercise of that power after the occasion therefor has passed by, is untenable, and yet that is the basis of Judge Hand's decision and reasoning in the court below. As stated above, such a doctrine at some time in the future will prevent the courts stopping the usurpations of executive power and the consolidation and extension of that power upon the pretext that it was authorized by Congress and under the claim that it cannot be reviewed and checked by the judiciary. The public has only a passing interest in these two cable companies but the country has a supreme interest in the question involved in these cases. The contention that the judiciary should renounce such a power is a most dangerous doctrine, and would elim-

inate what perhaps would be the greatest safeguard of the Republic. As Clarendon said, "The law is the standard and guardian of our liberty; it circumscribes and defends it; but to imagine liberty without law is to imagine every man with a sword in his hand to destroy him who is weaker than himself".

FIFTH: The seizure took place on November 16, 1918. The fact that the President's proclamation was dated November 2, 1918, does not preclude proof of the time of actual seizure, and the complainants are entitled to a judicial determination upon the question whether at that time the seizure was wrongful.

We are complaining of a seizure, and not of forms of words. The seizure had to be justified at the time it was made; it could not be justified with reference to a situation existing at a different time. If the seizure was not justified at the time when it was made, no antecedent proclamation could give it effect as against the complainants.

The Joint Resolution of Congress was not addressed to a proclamation; it was addressed to a seizure. The President could not add to his authority by a proclamation. He could not by a proclamation cause his authority to extend over and to reach into a situation otherwise not embraced within it. If the Act, when done, was within his authority, there was no occasion to refer to the proclamation in order to support it; and if the Act, when done, was not within his authority, he could

not give it legal effect by anything that he might have previously said about it.

The defendants' counsel cited below the case of *Lapeyre* v. *United States,* 17 Wall., 191, but it is quite clear that the decision is not in point. There the Act of Congress of July 13, 1861 (12 Stat., 257, s. 5), explicitly required a proclamation to be made by the President.

The President was authorized to proclaim that the inhabitants of a State were in a "state of insurrection against the United States" and that thereupon all commercial intercourse should cease. The point of the authority conferred by Congress was the proclamation itself. The proclamation created a *status.* Commercial rights, relations intercommunication depended upon the status thus created. The proclamation was a fact in itself. And when the Court had before it the question whether it should make publication of the proclamation a matter of extraneous evidence which might be conflicting and which might not be preserved, it referred to the very serious consequences which would result if the status to be created by the proclamation were thus left in uncertainty. It was under such an act, and in the light of such considerations, that the Court gave effect to the date of the proclamation. And even with respect to this conclusion, four Judges (Justices Hunt, Miller, Field and Bradley) dissented, and a fifth Judge (Justice Davis) merely concurred in the judgment. The case was followed in *United States* v. *Norton,* 97 U. S. 164, under the Act of June 13, 1865 (13 Stat., 763), which related to a proclamation annulling restrictions imposed upon internal, domestic and coastwise intercourse and similar considerations were involved. We are unable to find

anything in these authorities which bears upon the present case, where the important point is not proclamation, but seizure, and so far as the seizure is concerned the Joint Resolution does not call for a proclamation.

We therefore urge that the date of the proclamation is immaterial. The bills explicitly allege (*Transcript of Record,* p. 4, fol. 7), "that no seizure or possession of said cables was attempted, claimed or made until on or about November 16, 1918". This is controlling upon these motions, and the rights of the complainants, we submit, must be determined as to the legality of the seizure on that date.

SIXTH: The averments of the bills of complaint are amply sufficient to present the case of an arbitrary seizure outside the limits of the power conferred, and the complainants are entitled to proceed with their suits.

If it is possible to challenge the authority of the defendants Burleson and Carlton to seize and hold the property of the complainants upon the ground that there was no basis whatever for the seizure, that it was wholly arbitrary, and that no matter by whom determined the existing conditions offered no ground for a finding that the seizure was necessary for the national security or defense, then it is submitted that the allegations in this bill of complaint are abundantly sufficient to maintain the right of the complainants to come into Court and try their case.

We have already summarized the facts (*supra,* pp. 6-13).

A "full, adequate, complete and quick cable service" had been provided during the period of the War by these complainants (Transcript of Record, p. 4, fol. 7).

All Government messages were given precedence over all other messages and there was no complaint or occasion for complaint on the part of the Government in regard to the quick and accurate transmission of its messages (*Id.*). The complainants' cables were operated to their utmost capacity by a most competent staff of officers and cable operators (*Id.* p. 4, fol. 8). This service could not be increased or bettered, and the operation of the cable lines by or under the control of the defendants could not be improved (*Id.*). Ever since the United States entered the War, the American ends of the complainants' cables have been under the absolute control of the officials of the United States Government and particularly the control of the Director of Naval Communication, and nothing has been done by the complainants with respect to the operation of their cable lines without the knowledge and approval of the Director of Naval Communication. Every request, and even suggestion, made at any time by the Director of Naval Communication, or his representatives stationed in the cable offices of the complainants, have been promptly complied with and carried out in every particular (Id. p. 5, fol. 8). A most rigid censorship was established by the United States Government over the complainants' cables and the complainants have heartily cooperated therein. All the requests of the Government made of the complainants on behalf of the national security and defense have been promptly, fully and cheerfully complied with by the complainants (*Id.*). On October 29, 1918, at the request of the Government at Washington, the complainants placed at the disposal of

the Department and the President a special cable across the Atlantic, so that there might be instantaneous communication between the Government at Washington and its American representatives at Paris (*Id.*); the complainants promptly set aside one of their trans-Atlantic cables for that purpose and furnished a through circuit from Washington to Paris which has ever since been at the disposal of the State Department and the Government.

It is also a matter for judicial notice that when the Joint Resolution of Congress was passed on July 16, 1918, there had been a state of actual war for fifteen months with increasing intensity. Had the experience of these fifteen months, or any portion thereof, shown that it was necessary for the national security or defense to seize the cables, and such necessity existed when the Resolution was passed, it became the duty of the President to make the seizure at once. But there was no such seizure. The failure to seize the cables when the authority had been granted by the passage of the Joint Resolution, fairly indicates the absence of any necessity at that time, despite the experience of the preceding fifteen months of war, that there should be such a seizure. It does not lie with the Government to assert the contrary.

Not only was there not a prompt seizure of the cables after the authority to seize them had been granted, but weeks and months passed, and there was no seizure. Again, there is but one inference and that is that there was no necessity for such a seizure. The allegations of the bill thus find direct support in the facts judicially known to the Court and to all mankind. Not only were the cables not seized, but the telegraphs and telephones *were* seized on August 1, 1918. This action was under

the same Joint Resolution, which embraced in one grant of authority, the telegraphs, telephones and marine cables.

Thus, after the passage of the Joint Resolution, during the continuance of actual hostilities when we were straining every nerve to meet force with force, there was evidently a consideration of the action that should be taken. The action with respect to the telegraph and telephones was deliberate; it was announced nine days before it took effect on August 1, 1918. The Government thus purported to take possession and control of every telephone in every shop and dwelling where there was a telephone in the United States, and also purported to take possesion of the land telegraph systems of the United States. But at no time during the actual conduct of the War was there any attempted seizure of the cables. Plainly, there was no finding on the part of the President that during this period, although the War was being fought with the utmost vigor and relentlessness, the seizure of the cables was necessary for the national security or defense. And it does not lie with the Government to assert, in the light of that fact, that any such necessity could be deemed to have existed.

On November 11, 1918, the armistice was signed. Its conditions were most onerous. The signing of the armistice had been preceded by frantic efforts on the part of Germany to start negotiations for peace. Undoubtedly the Court will take judicial notice of what had happened. At the end of September Bulgaria quit the War. In October there was a series of notable successes by the Allies on all fronts—in France, in Italy, in Mesopotamia. Before the end of October, Austria asked for an immediate peace and soon an armistice was arranged with Austria

and another with Turkey. The Germans were in retreat on the Western front, and the Kaiser and his son fled to Holland. The resistance of the enemy collapsed.

The conditions were so well known throughout the country that the announcement of the signing of the armistice was everywhere hailed not only as the ending of immediate hostilities, but as the conclusion of the actual War. So obvious was it that complete victory had been attained and that we were no longer in danger from the forces of our enemies, that the President appeared in Congress officially to announce the signing of the armistice and the inability of Germany again to threaten our security. This was on the very day the armistice was signed, November 11, 1918, when the President after stating to Congress the terms of the armistice, said:

"The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." (Transcript of Record, p. 3.)

What did the President mean? He certainly did not mean that a treaty of peace had been signed; he did not mean that a state of war, in the technical legal sense, no longer existed; he did not mean that a relation of amity, as a status, had been restored between the belligerent nations.

But with the full understanding of legal terms, the President announced that the war had come to an end, that Germany was reduced to helplessness and that it was impossible for Germany to renew the war. What he meant is as clear as noonday,—he meant that there was *no longer any danger to the security and defense of the United States.* The enemy lay prostrate, compelled to accept conditions which made it powerless to strike

back. It was said upon the argument below that the armistice allowed a certain period of time for the various surrenders contemplated. But the situation produced forthwith made it impossible for any continued menace from our enemies to our national security. This was known to every man, woman and child in the United States, and that it was not unknown to the Government is shown by the official declaration of the President to Congress.

Now, after five days had elapsed, days full of rejoicing over victory, every one of which gave added evidence of the completeness of the victory and the helplessness of our enemies, the marine cables were seized. We protest that what was not necessary on August 1, 1918, when the Government purported to seize the telegraphs and telephones; that what was not necessary on September 1st or October 1st or November 1st, it is the height of absurdity to say was necessary from any proper point of view on November 16, 1918. The bills of complaint allege, in the appropriate language of averment, stating the ultimate fact, that the seizure of the cables was unreasonable and arbitrary; that it was not necessary for the national security or defense that the cables should be seized and possessed by the defendants or by anyone else; that the national security or defense will not be furthered in the slightest degree by such seizure.

At one and the same time, on November 16, 1918, *all* the marine cables were seized. The quality of the seizure is shown by the extent of the seizure. By the same Act, on the same day, not only were the thirteen Atlantic cables seized, but 10,000 miles of Pacific cables running to China, Japan and the Philippines, the cables to Cuba and Hayti, and the South American cables running from

New York to Panama and thence down the west coast of South America and over the mountains to the Argentine Republic were seized also.

The Commercial Pacific Cable Company is complainant here as well as the Commercial Cable Company. The former owns the 10,000 miles of Pacific cables, and as to *this* seizure, the assertion of power on the pretext that its exercise was necessary for the national security and defense is made as with respect to the Atlantic cables. We have not heard or read of any justification of this action that rises to the dignity of an intelligible explanation. The bills of complaint allege the facts with regard to this extensive seizure (Transcript of Record, pp. 5, 6) as well as the fact that the seizure itself does not facilitate or better in the slightest degree the transmission of any Government messages, or any other messages.

In other words, the fact is alleged in the bills of complaint, and it is a pertinent fact with respect to the existence of any basis for this action, that there is not the slightest benefit to the Government, or to anyone else, in the transmission of messages for which these cables are used, by reason of the seizure. And it requires but slight reflection, in the light of the admitted facts of operation as shown by the bill, to see that there is no advantage to the Government with respect to the use of the cables for transmitting messages that was not previously possessed. Indeed, as we have said, the absence of any disadvantage to the Government in the matter of such transmission was sufficiently shown during the actual conduct of the war by the failure to exercise this power.

The bills of complaint allege both specific facts and

the appropriate conclusions of fact. We urge that we are entitled to be heard on the arbitrariness of this seizure, and that, assuming that we are thus entitled, the bills of complaint are abundantly sufficient to present the complainants' equity.

SEVENTH: The seizure of the cables by defendants is not for the purpose of national security or defense, but for ulterior purposes contrary to law.

Why were the cables seized, when they were seized? The bill alleges why. It is no answer to say that the determination was by the President. For we are entitled to show the moving cause, misconstruction of the authority conferred, the plan and purpose of the defendant Burleson, to whom the matter was immediately referred and who is the leading figure in this seizure. Furthermore, it is the defendant Burleson who is here, and whose acts we are seeking to restrain. The bills of complaint allege his plan and his purpose. These allegations as against the defendant are pertinent and important and he cannot with respect to his attempted utilization of this authority for these purposes hide behind the President. It is through the plan and purpose of the defendant Burleson that the seizure of the cables becomes intelligible.

The bills of complaint allege that the defendant Burleson proposes to intermingle the complainants' business, good-will, staff, organization, employees, plants and equipment with that of the Western Union Telegraph Company so that the separate identity and business of

the complainants will disappear and that they may be forced to abandon competition and acquiesce in the defendant's plans for Government ownership and for the amalgamation of all cables (*Transcript of Record,* pp. 4, 7, 8).

We beg the Court not to treat lightly this allegation. It is an allegation that, if we are permitted the standing in Court to which we believe we are entitled, we purpose to prove. There was a reason after the signing of the armistice and the ending of all menace to our national security for a hurried effort to take the cables, not because of any necessity for the purpose of national security or defense, but for fear that this plan of amalgamation and this ulterior and illegal purpose could not be carried out. That is the explanation which fits the facts, and the only explanation, we believe, which does fit the facts.

The Joint Resolution of July 16, 1918, does not contemplate, after the menace to the national security or defense is removed, or without any real or substantial relation to the national security or defense in any proper sense, that it should be made the instrumentality of a destruction of competition and of a unification otherwise condemned by Act of Congress, and in utter disregard of the rights of these complainants to the property which they had built up and owned and to the enjoyment of which they were entitled. It makes no difference whether or not arguments can be advanced by the advisers of the defendant Burleson (or by the defendant Burleson himself) as to a supposed advantage in unifying all the cable systems or all the telegraph and telephone systems of the country. And all that may be said about the advantage of a "single system", in the fur-

therance of this policy upon which the defendant Burleson is intent, as alleged in the bills (Transcript of Record, pp. 7, 8), is far removed from the authority conferred by this Resolution for war purposes and on the basis of necessity with respect to the national security and defense.

It is earnestly submitted to the Court that the motions to dismiss have but one purpose and that is to deprive these complainants of the opportunity to show, in the protection of their property rights against an unwarrantable invasion, the true facts with respect to the reasons for this seizure,—the facts which are alleged in the bills of complaint and which show the manner in which the authority conferred by Congress has been misconstrued and its limitations disregarded. (*Id.* pp. 4, 7, 8.)

EIGHTH. No proper provision has been made for the payment to complainants of just compensation for the possession and use of their cables, whether such compensation is fixed by the President or by the Court of Claims.

The Joint Resolution provides that the compensation is to be determined by the President and if the amount so determined is unsatisfactory to the person entitled to receive it, such person shall be paid seventy-five per-centum of such amount and shall be entitled to sue the United States to recover such further sum as will make up "such amount as will be just compensation therefor in the manner provided for by Section twenty-four, Para-

graph twenty, and Section one hundred and forty-five of the Judicial Code". That is, the provision is (1) for an executive determination, and (2) for suit in the District Court, where recovery is sought for not more than $10,000, or in the Court of Claims for the same or a larger sum.

With respect to the executive determination the bills allege that the power to fix the compensation has been illegally delegated (Transcript of Record, p. 7, fol. 12).

In order to comply with the Joint Resolution the provision for the executive determination should be carried out according to the terms of the Resolution. But the bills allege that the authority thus conferred is intended to be exercised through the defendant Burleson. That this is no idle allegation appears from the fact that in the case of the Postal Telegraph-Cable Company the system of which was seized under the same resolution, the fixing of the compensation was actually committed to the defendant Burleson. The bills allege that the defendant Burleson is not a fair and impartial tribunal, that he has for years advocated Government ownership of telegraphs and cables and that the delegation to him of the authority to fix the compensation is not in accord with the terms of the Resolution.

In the scheme of compensation under the act, the Executive determination is of great importance, and from any point of view the complainants are entitled to be protected from having the fixing of compensation turned over to the defendant Burleson, as he is neither the President, nor an impartial tribunal, nor one to whom, on the allegations of the bill, the power of Executive determination should be committed. It is essential that none of the tribunals which determine the amount of compensa-

tion should have any preconceived opinion in the matter (Nichols on Eminent Domain, 2nd Ed. p. 946). The defendant Burleson, as alleged in the bill, is interested personally and officially in giving an unfair, unreasonable and inadequate compensation. Even if it were assumed that the provision for compensation in the Joint Resolution were a valid provision, the complainants would be entitled to the intervention of the Court to protect them against this attempted method of fixing compensation under the Resolution.

But there is a deeper, and a Constitutional objection to the Joint Resolution itself. There is no adequate provision to secure to the complainants the payment of the compensation to which they are found to be entitled. The bills allege that the right to resort to the Court of Claims is an illusory right, in that no provision has been made for paying any judgment that the complainants may obtain (Transcript Record, pp. 6 and 7). There is no compulsory process by which a judgment of the Court of Claims may be collected and it is entirely voluntary with Congress whether any such judgment should be paid or not.

It is submitted that this is not a provision for the payment of just compensation, when property is taken for public use, that is required by the Fifth Amendment.

There are, it is believed, three classes of cases in which the property of a citizen may be taken in the course of the conduct of the War.

The first class embraces what may be described as the sacrifices of the battlefield. Citizens' property may be taken or destroyed in the course of the actual con-

flict and for such losses he has no redress. "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of the roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *supreme lex.*" (*United States* v. *Pacific Railroad,* 120 U. S. 227, 234).

The second class of cases relates to the property of loyal citizens taken under urgent necessity for the service of the armies, such as vessels, steamboats and the like, or buildings to be used as store-houses, etc. The seizures of this class are based upon extreme military necessity, and compensation ought to be made, although it may not be a case of seizure of private property within the terms of the constitutional clause. In *United States* v. *Pacific Railroad, supra,* after referring to the fact that the Government was not responsible for destruction of private property in necessary military operations, the Court went on to describe this second class of cases where there was a taking on grounds of extreme necessity and compensation should be made, although it might be not constitutionally guaranteed, in the following language (*Id.* p. 239):

> "In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 13 How. 115, 134; *United States v. Russell*, 13 Wall. 623."

What is meant by the Court in this passage is shown by the reference to the leading case of *Mitchell* v. *Harmony*, 13 How. 115, in which the limits of the right to take the property of the citizen, on the basis of military necessity are clearly defined. As already noted at the outset of this discussion, it is the taking by military officers in connection with immediate military operations, which are extremely urgent. Unless these limits are observed, the officer taking is a trespasser. Furthermore, unless he takes within the limitations of the law he cannot defend himself by producing the orders of his military superior. To escape the charge of trespass,

it must appear that the military necessity was of the most pressing character, and the fact of the necessity may be put in issue and tried in the action against the officer.

Mitchell v. *Harmony, supra.*

In a later case, that of *United States* v. *Russell,* 13 Wall, 623 (also cited as authority for the statement above quoted), the Supreme Court summarized the rules thus established. After referring to the constitutional provision, requiring that property shall not be taken for public use without just compensation, the Court thus describes the cases of extreme necessity which might arise in time of war, as follows (*id.* pp. 627-628):

> "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other

means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

It was to cases of this sort that the Supreme Court alluded in *United States* v. *Pacific Railroad, supra,* as those which justified the seizure and appropriation of private property, on the ground of extreme necessity, where the seizure might be not within the terms of the constitutional clause but the Government should provide compensation.

The principle applicable to this second class of cases does not aid the defendants here, for not only is it per-

fectly apparent that there was no necessity for the seizure, but in any event the complainants would be entitled under the rule in *Mitchell* v. *Harmony* to a judicial determination whether the necessity existed.

The third class of cases is where the property of a citizen is taken for public use and just compensation must be made under the Constitutional provision. It matters not, if the taking is not within the two classes first mentioned, whether it is in time of war or in time of peace; the property cannot be taken without just compensation (*United States* v. *Russell, supra*).

There can be no question that in the present case Congressional action was required. The fact that there was Congressional action clearly showed that, apart from it, there was not thought to be any basis for the seizure by military commanders. Throughout the war the Commander-in-Chief made no attempt at seizure of these cables. He made no attempt at seizure of the telegraphs and telephones, except under the Joint Resolution, and when the cables were seized the Joint Resolution was invoked as authority.

The case is plainly one in which the constitutional requirement applies. This being so, there are well settled rules that govern.

It is elementary that the owner is entitled to reasonable, certain, and adequate provision for his just compensation, before his occupancy is disturbed. While he may not be able to insist on actual payment of compensation before entry upon his property, the provision securing to him that payment must be certain and adequate. Thus in *Sweet* v. *Rechel,* 159 U. S., 380, 402, the provision for the payment of compensation for lands taken by the

City of Boston was found to be adequate because the owner had an "unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process".

See also:

Cherokee Nation v. *Southern Kansas Railway*, 135 U. S., 641, 659.

To turn the complainants over to the Court of Claims, with no provision for the payment of the judgment is not to make provision either reasonable, certain or adequate. The defendants' counsel rely upon the case of *Crozier* v. *Krupp*, 224 U. S., 290. But this case falls far short of supporting the defendants' contention. Indeed, it furnishes a strong implication to the contrary, as the Court was very careful to limit its ruling to the precise case before it.

The case of *Crozier* v. *Krupp* dealt with the Act of June 25, 1910 (36 Stat., 851), under which it was provided that where a patent of the United States was used by the United States without license of the owner or lawful right to use the same, the owner might recover reasonable compensation by suit in the Court of Claims. It was pointed out that the enactment grew out of the prior situation, which gave the owner no right to sue the United States for redress where his patent was infringed by an officer of the Government unless it could be established that there was an implied contract to pay. This was an obvious injustice to the owners of patents because, as the Court said, "of the frequent possibility of their infringement by the acts of officers under circumstances which would not justify the implication of a contract". The statute gave a right, in such a case, to sue

the United States and thus to permit the owner of the patent to recover against the United States in circumstances where otherwise he would have been remediless. In short, the owner retained his patent, he retained all the rights of user and of license that he had before, and he was given by the statute the additional right to sue the United States in case of the use described. And it was with respect to the use by the United States under those conditions, that it was held sufficient to give a right of suit in the Court of Claims.

In discussing the sufficiency of the provision for compensation, the Court was very careful to limit its statement to the precise case before it. The Court, in referring to the assumption of a duty on the part of the Government, that is, the pledge of the public good faith as a guaranty, qualified its statement by saying that it had "reference to the nature and character of the property taken, its value and the surrounding circumstances" (*id.*, p. 306). The particular question as to the adequacy of the method of compensation had not been raised by counsel, and having made a careful and guarded statement of the principles, the Court again emphasized the fact that it was confining "their application, as we have done in their statement, strictly to the conditions here before us, that is, the intangible nature—patent rights—of the property taken". The Court constantly emphasized the desire to confine itself to the particular case.

In *Great Falls Manufacturing Co.* v. *The Attorney-General*, 124 U. S., 581, the Court had found the question whether recourse to the Court of Claims was a sufficient provision for compensation, of much interest. But the Court did not find it necessary to determine the question, as the plaintiff had availed itself of the remedy provided.

The Court found that by the act of suing in the Court of Claims, under the statute there in question, it had waived any right which it might otherwise have had to object (*id.*, p. 599). Here, again, the fact that the Court found it necessary to qualify its statement, and to base its decision upon the waiver of the owner, is strongly against the view that to permit recourse to the Court of Claims is in itself a sufficient compliance with the constitutional requirement.

It is said that to assert that this is not an adequate provision is to impute bad faith and that the United States is incapable of bad faith. Certainly we would be the last to suggest bad faith. But there is a wide difference between an imputation of bad faith and compliance with the constitutional provision for the payment of just compensation.

The question must be considered with respect to the nature and extent of the property taken. This was pointed out in the *Crozier* case, and the limited right there involved was emphasized. In the present case the nature and extent of the property taken raise the gravest questions. In the first place, all the cable systems owned in the country are taken, involving vast amounts, and it is obvious that the larger the amount involved the more important that there should be no lack of adequate provision for the payment of the compensation.

Again, *what is actually taken?* It is the user of the cable systems. These cable systems have not been used, and are not used, simply for the transmission of Government messages. They are income-producing properties, wholly irrespective of uses for governmental purposes. They are the instruments of communication constantly

used by private persons. The business is a profitable one, despite competition. The use by the Government under this seizure involves not simply the tranamission of Government messages, but *the taking of the profits of this business* which would otherwise enure to the complainants.

The Government had its practical control before, as the bill alleges. The seizure means that the Government takes the *profits*, that is, the *income* from the business. There is no pretense that it has changed rates. It seizes a "going" business with money coming in hourly. It takes this money which would otherwise go to the complainants.

What is the compensation for the seizure of money? Is it adequate provision for the payment of just compensation to seize these moneys daily coming in through the operation of the complainants' cables and leave the complainants to sue in the Court of Claims for the actual moneys diverted from their possession?

If, as was said in *Crozier* v. *Krupp*, the question must be considered in the light of the particular property taken, then it is evident that if in any case the giving of recourse to the Court of Claims without provision for the payment of the judgment, is *not* provision for just compensation, then it is certainly not such provision for just compensation, in these cases.

Even the defendant Burleson recognizes the impossible situation he is in in regard to paying compensation to the various telegraph, telephone and cable companies, the property of which he claims to have taken over. We may quote the report of the argument recently made by one of the solicitors of the defendant Burleson (in the Court below), Mr. Charles N. Bracelen, who appeared for

the American Telegraph & Telephone Company in the suit in the Federal Court in Indiana instituted by the Public Service Commission of that State to enjoin Mr. Burleson (who is in control of the operation of the lines of that Company under the seizure of all telephone systems) from increasing intra-state telephone rates. The provision as to compensation for telephone lines is the same as that with respect to the cables, both being embraced in the same Joint Resolution. In his argument in that case, on January 28th and 29th—subsequent to the argument of this case in the Court below—Mr. Bracelen is reported to have said:

> "There is no appropriation made—merely the pledge of the good faith of the United States that when judgment is rendered the United States will pay it, just as any other judgment debtor pays its debts. The failure of Congress to make an appropriation to pay this compensation in the joint resolution—its failure to this date to make any appropriation or any provision for this compensation—and your Honor will take judicial notice that no law of that kind, no appropriation has been made to this date—shows clearly that *the compensation is to come out of the operation of the properties,* and the Act has been construed in that way, from midnight of July 31st. How are we to say reasonably and fairly that a failure to appropriate money means that Congress is going to appropriate the money? Isn't it more reasonable, isn't it more probable that Congress intended that the Postmaster General who, if the President decided was to take all of the telephone companies and operate them as he deemed needful and desirable for the duration of the war, and possess them, that he was to take the revenues out of the operating revenues of those systems money enough with

which to make them pay their way, and isn't that just and reasonable and right that these properties shall pay their ways?" (Italics ours.)

Mr. Burleson's Chief Solicitor is Mr. Lamar, who is also one of the Committee of three appointed by Mr. Burleson to take charge of this entire question of compensation to the telegraph, telephone and cable companies. Mr. Lamar appeared before the Committee on the Post Office and Post Roads of the House of Representatives on January 14th, 1919, and the following are extracts from the printed record of the hearing on that day as published by the Government.

"Mr. Lamar: We do not need any appropriations; the properties will be operated on their own revenues.

"Mr. Steenerson: You are aware that the Constitution provides that no money shall be taken out of the Treasury of the United States unless it is pursuant to the action of Congress?

"Mr. Lamar: These operating revenues never get into the Treasury of the United States."

"The Chairman: What do you say to an amendment of this sort to this bill, '*Provided*, That the Treasury of the United States shall not be called upon to pay for the maintenance of this system of temporary Government control, and all the money to be expended by the department will be limited to the revenues derived from service'? Of course, that is not the exact language that would be used.

"Mr. Lamar: I see no objection to such an amendment. In fact, such a provision in the law might make definite now what a good many gentlemen do not seem to understand, and I think it would be better if we were to have such an amendment as that" (p. 31).

Mr. Burleson's first assistant is Mr. Koons and he also is one of the committee of three appointed by Mr. Burleson to fix the compensation to the telegraph, telephone and cable companies. Mr. Koons was before this same Committee of the House on the Post Office and Post Roads on January 23rd, 1919. The following is from his statement (p. 350):

> "Mr. Madden: You mean to say you have not obligated the Government to pay more than the revenues with any company with which you have made a contract?
>
> Mr. Koons: What we believed the revenues would be.
>
> "Mr. Madden: But you have obligated the Government to pay that amount, whether the revenues reach that sum or not?
>
> "Mr. Koons: Absolutely, we have not."

Mr. Koons further said (p. 351):

> "Mr. Steenerson: But supposing the Bell system throughout the whole United States, under your contract, showed less receipts than you have money to pay them: Where is the money to come from?
>
> "Mr. Koons: We do not anticipate that will happen.
>
> "Mr. Steenerson: Suppose it did happen?
>
> "Mr. Koons: It would have to be determined later.
>
> "Mr. Steenerson: Would you come to Congress for an appropriation, or would you apply the surplus in the case of other companies that had a surplus?
>
> "Mr. Koons: We would have a right to consider the operating surplus as one fund and pay any indebtedness out of it.

"Mr. Steenerson: Then in that way you would protect the Government against loss?

"Mr. Koons: Yes.

"Mr. Madden: Suppose the operating revenues are not sufficient to meet the loss?

"Mr. Koons: Then we would have to come to Congress; they would have a claim against the United States.

"Mr. Madden: The same as the Railroad Administration had to come for $269,000,000?

"Mr. Koons: That could be covered in one of two ways; either to come to Congress for an appropriation or they could bring suit in the Court of Claims."

The foregoing statements by three of Mr. Burleson's foremost representatives show the official point of view as to the payment of compensation. It is apparent that there is no certainty of payment whatsoever, but abundant room for disagreement, contention and indefinite delay.

The Joint Resolution does not provide that compensation shall be paid out of any available money in the Treasury. No appropriation has been made by Congress to pay any compensation, and the above extracts from the testimony of Mr. Lamar, Mr. Koons, and the argument of Mr. Bracelen, show that it is contemplated by them that all compensation shall be paid from the profits of the operation of the telegraph, telephone and cable lines. This is very much like the case of *Sage* v. *City of Brooklyn,* 89 N. Y. 189, where the city condemned property under a statute, and notwithstanding the statute imposed on the city the duty of paying compensation to the land owners, yet the City Comptroller refused to pay

the claim of Sage on the ground that the monies collected by the City Comptroller from benefits to adjoining land had been exhausted and nothing was left for Sage. The court held that under the statute a suit could be maintained against the city, and as to the theory advanced in that case the same as in this case at bar that the compensation should be paid out of the receipts from assessments, the court said (p. 195) that while payment by a municipality under a statute in condemning need not be concurrent with the taking, yet that there must be

> "a sure, sufficient and convenient remedy by which the owner can subsequently coerce payment by legal proceedings. If such provision is not made, then, as was said by Nelson, Ch. J., 'the law making the appropriation is no better than blank paper.' (*People ex rel. Utley* v. *Hayden*, 6 Hill, 359)."

The court further said (p. 196):

> "The pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the property owner, *accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment*, has been held to be a certain and sufficient remedy within the law" (Italics ours).

In the case of *Chapman* v. *Gates*, 54 N. Y. 132, the court quoted with approval (p. 146) the following from a decision of Chief Justice Nelson in *People* v. *Hayden, supra.*

> "although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before

> property is thus taken, it is, I apprehend, the settled doctrine, even as respects the State itself, that at least *certain* and ample provision must be first made by law (except in cases of public emergency), so that the owner can *coerce payment* through the judicial tribunals, or otherwise, *without any unreasonable or unnecessary delay*" (Italics not ours).

In the case Matter of Application of Mayor, etc., of the City of New York, 99 N. Y. 569 the court said (p. 577):

> "While it is not necessary, in advance of the taking, to pay to the landowner his compensation, it is necessary that the act which invades his ownership shall provide for a certain and definite and adequate source and manner of payment. (*Sage* v. *City of Brooklyn*, 89 N. Y. 189). This necessity is vital and of the most essential character, since if unheeded or disregarded, it transforms the right of eminent domain into a legalized plunder of the citizen."

In the case of United States *v.* O'Neill, 198 Fed. 677, a proceeding by which the Government condemned land for a ditch under the "Reclamation Act" of June 17, 1892, c. 1093 (32 Stat. 389) was sustained, under the rule that payment need not be made in advance of the taking but it was pointed out "The reclamation Act provides a fund from which to pay the damages to which defendants may be entitled" (p. 683).

In the case of *Re Lincoln Park*, 44 Minn. 299, there was involved a condemnation statute to the effect that the compensation for land taken for parks should be paid out of a "park fund" and not made a

general charge upon the treasury of the city. The court held that the statute was unconstitutional in that respect. The court said:

> "Unless there is certainty that it will be paid, or unless it is made a public charge, so that it may be obtained in due course through the aid of the courts without unreasonable delay, there is no adequate provision for obtaining compensation."

In *Carbon Coal, etc., Co.* v. *Drake,* 26 Kans. 345, the court said:

> "Where there is no remedy in the law to which the landowners can resort of their own motion for compensation, such a law is void."

In the case of *East Shore Land Co.* v. *Peckham,* 33 R. I. 541 (1912), the court sustained condemnation proceedings by the State of land for park purposes because the statute ordered that the compensation should be paid forthwith "by the general treasurer, out of any funds available therefor". We quote at length from this opinion as the matter is fully discussed. The court quoted the following extracts from the brief of counsel (pp. 550-554):

> "It is a fundamental principle that when the property of any citizen is taken under authority of the government against the will of such citizen, he shall be paid therefor a just compensation. It is fundamental, in this state, differing from other states where the compensation must in all cases be paid in advance before entry, that the just compensation which is guaranteed by our constitution must either be paid before the title passes

or must be secured to the owner of the property in some substantial manner, so that he will not be subjected to any uncertainty concerning it or any unreasonable delay in obtaining it. Of course, where payment is made before the title passes, there can be no question of the validity of the act on the ground of lack of just compensation. But where such payment is not made, the very serious question of what constitutes a securing of such compensation to the owner, arises. In the case of taking by *quasi-public* corporations under the authority of this state, it is invariably required that the corporation shall give such security for the payment of such compensation as the courts may order. In the case of taking by the state for its own purposes, the law will require that such compensation as may be determined just by the courts, shall be secured by a definite appropriation for that purpose, provided for in the act under which the condemnation is made. As was well said in the case of *Bloodgood* v. *Mohawk & Hudson Railroad Company*, 18 Wendell, 1, on page 17, where the opinion was written by Chancellor Walworth, 'I hold that before the legislature can authorize the agents of the state and others to enter upon and occupy or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of damages or compensation, and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. * * * But it was certainly not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public,

> and then to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated or an appropriate remedy must be provided and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. * * * He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive or the fund out of which he is to be paid.' "

And after quoting further from counsel's argument and its citation of cases (including *Haverill Bridge* v. *County Commissioners*, 130 Mass. 124, *Sage* v. *City of Brooklyn*, 89 N. Y. 189, and *People* v. *Hayden*, 6 Hill 359) the Court said, sustaining the statute before it, but only upon the ground that the provision was adequate as it provided for payment out of all the available funds in the treasury (p. 554):

> "We see no reason for dissenting from the doctrine set forth in the cases cited in the foregoing argument; on the contrary, we heartily concur in the views therein expressed, but in our opinion they do not apply to the statute under consideration. It is undoubtedly true that statutes which authorize a taking must also provide for compensation. Lewis Em. Dom. §452—'Statutes which provide for a condemnation of private property, and fail to provide compensation therefor, have sometimes been spoken of as void. This is probably, however, a mere inadvertence of expression. Such acts would simply be inoperative so far as

the power to condemn property is concerned, but might be carried into execution by the purchase of the requisite property, or aided by a subsequent act supplying the defect. Proceedings under such an act to take property *in invitum* will be quashed or set aside on motion, and any interference with property thereunder may be enjoined.' However, a distinction is recognized between a taking by the public and by private parties. *Ibid.*, §457: 'As a general rule, the courts which hold that compensation need not precede occupation also hold that some provision must be made for compensation whereby the owner will *certainly* obtain it, and that it is not enough that the law provides a mode for ascertaining the amount of compensation and imposes, on the party taking, the duty of making payment. A distinction is usually made by such courts between a taking by the public, that is by the State or public corporations, and a taking by private corporations or individuals. In the former case, the compensation is a public charge, the good faith of the public is pledged for its payment, and all the resources of taxation may be employed in raising the amount.

"'If the power of eminent domain is exercised for the benefit of the State or one of its municipalities, it is not essential that payment should first be provided, for it is supposed that the public faith is a sufficient pledge and guaranty for the payment of what is awarded. But in this case, the law must provide a means of making his claim effective against the State or the municipality, which shall be adequate and certain, and which may be initiated by the property owner himself at his own discretion.' Black's Const. Law, second ed. p. 425, and cases cited * * *

"The provisions in the present act under consderation are that, in case of the agreement of a

party with the executive committee of the commission for the price or value of the land or interest therein taken, *the same shall be paid to him forthwith,* upon the order of said executive committee, *by the general treasurer,* out of any funds available therefor. In case of inability to so agree ample provision is made for the assessment of damages by a jury, with every right preserved and upon the recovery of final judgment (against said commission as appears in Sec. 3), execution shall be issued therefor and shall be forthwith paid by the general treasurer out of any funds available therefor. Section 3 permits the owner or person interested who fails to receive personal notice to file his petition within one year provided such person had no actual knowledge of the taking in time to file his petition, and provided the state shall not have paid any other person, or be liable to pay for the same under any judgment rendered, under the provisions of the act. * * *

"Accordingly we are of the opinion that the language employed in the act constitutes not only a direction to the state treasurer to forthwith pay the amount ascertained to be due, under the provisions of and in the manner required by the act, out of any money in the state treasury not otherwise appropriated, but also amounts to an appropriation of such money for that purpose, inasmuch as it subjects the same to that use. We are therefore of the opinion that the statute under consideration contains ample provisions for the prompt payment of just and adequate compensation, for land taken thereunder, to the persons entitled to the same, and find that the said act does not violate the requirements of the Constitution of Rhode Island, Art. I, sec. 16."

In the present case there is no provision whatever for the payment of the judgments. It is said that the complainants must have confidence that Congress will make provision for the payment. But it is submitted that this confidence is not a substitute for the constitutional guaranty.

The amounts involved are vast. It would have been an easy matter to segregate the moneys received from the use of the properties and make proper appropriation for the remainder of the compensation found to be just. But Congress has authorized the seizure of the going business without any provision for payment whatever. In the *Crozier* case the owner of the patent was really deprived of nothing; he was practically remediless—as action against the individual officer would rarely furnish a remedy—in the case of the infringement to which the statute applied. The Act made provision for payment for a use as to which otherwise the patentee would ordinarily receive nothing. In such a case, dealing with that sort of property and that exceptional right, it could not be said that the remedy in the Court of Claims was not adequate. The Government was not previously suable; it permitted itself to be sued and it had the right to affix the conditions of the suit and the extent of the remedy it would allow. The patent was not taken by the Government. The patentee continued to enjoy his patent and all his rights therein; he simply was given a remedy for an infringement of which otherwise he could not, so far as the Government was concerned, complain.

The case is very different, however, when property is actually taken. This Court has never countenanced the notion that property can be taken without certain and

adequate provision for just compensation. The constitutional guaranty itself is an answer to the contention that the complainants must trust to Congress. If this were sufficient there would be no need of the guaranty. It was to obviate this very contingency that the constitutional guaranty was afforded.

It will doubtless be said—as it was said below—that in much of the legislation during the last two or three years, similar provisions have been inserted. This suggestion, however, is beside the mark, as the inadequacy of the provision under consideration would be none the less apparent.

If, however, the purpose of such a suggestion is to intimate or urge that serious consequences might ensue from sustaining the constitutional guaranty with its appropriate effect, it may be answered that the consequences with respect to other cases may be greatly exaggerated. It is our understanding that in important instances agreements have been made with the parties concerned and, of course, such agreements will not be affected by any ruling with respect to the constitutional protection.

There is, however, a far more important phase of the matter. There never was a time when it was more necessary that the duty to make certain and adequate provision for the payment of just compensation for property taken by the Government should be enforced. We can imagine nothing more serious than to say, in a case like this, that merely to refer the party, whose property is taken, to the Court of Claims is a sufficient compliance with the Constitution. It can hardly be gainsaid that this would open an era of the gravest uncertainty. If the Constitution compels such a conclusion, the serious

injury that would result can not be avoided. But, we submit, that, not only does the Constitution not compel it, it forbids it.

The decree in each case should be reversed and each cause remanded to the District Court with direction to proceed according to law.

WILLIAM W. COOK,
CHARLES E. HUGHES,
Of Counsel for Complainants-Appellants.

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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, APPELLANT,
v.
ALBERT S. BURLESON AND NEWCOMB CARLTON.
No. 815.

COMMERCIAL PACIFIC CABLE COMPANY, APPELLANT,
v.
ALBERT S. BURLESON AND NEWCOMB CARLTON.
No. 816.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Each of the above-named appellants filed its bill of complaint, practically alike, seeking to enjoin the Postmaster General and his appointees from retaining possession and continuing the control of the marine cable systems of said respective appellants, de-

scribed in said bills. Each bill averred in substance as follows:

That complainant is a corporation organized under the laws of the State of New York, with its principal place of business in the City, and in the Southern District, of New York. The Commercial Cable Company averred that it owned a system of submarine cables in the Atlantic Ocean, extending from the United States to Canada, Newfoundland, Azores Islands, United Kingdom of Great Britain, and France; that said systems included certain cables extending from New York City to the points mentioned (R. No. 815, p. 2).

The Commercial Pacific Cable Company averred that it owned a system of submarine cables in the Pacific Ocean extending from San Francisco to China, Japan, and the Philippine Islands (R. No. 816, p. 2);

That on July 16, 1918, Congress passed a Joint Resolution authorizing the President

> during the continuance of the present war * * * whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the Proclamation by the President of the exchange of ratifications of the treaty of peace (R. 815, 816; pp. 2, 9);

That said Resolution also provided for making just compensation to the owners, the same to be determined by the President, with a right to any dissatisfied owner to receive 75 per cent of such award, and to sue the United States for additional compensation, as provided by section 24, paragraph 20, and by section 145 of the Judicial Code (R. 815, p. 10; 816, p. 9);

That on November 11, 1918, an armistice was signed suspending hostilities of the present war; that thereupon the war ceased within the letter, purpose and spirit of said Joint Resolution so far as it authorizes the taking of possession and control of the cable systems (R. 815, p. 3; 816, p. 2);

That on said date the President officially addressed Congress in joint session and formally announced the termination of the war by stating in such address:

> The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it (R. 815, 816; pp. 2, 3);

That the defendant Burleson was and is Postmaster General of the United States, and, assuming to act as such, announced informally through the public press on or about November 16, 1918, that he had taken possession and assumed control of all marine cable systems owned or operated by any or all American corporations; that his action was based on the Proclamation of the President dated November 2, 1918, reciting "done by the President this second day of November," but not in fact signed until after

November the 11th, which recited that the President took over the possession of the cables of complainant and others and directed the Postmaster General to assume this possession and to operate said cables; that said defendant Burleson assumed this possession on or about November 16 (R. 815, 816, p. 3);

That said seizure, or attempted seizure, of complainant's cable systems is unconstitutional, unauthorized, *ultra vires*, illegal, and void for the reasons (*a*) that the war had terminated within the meaning of said Resolution prior to the time of said seizure and the alleged authorization thereof; (*b*) that Congress had no power or authority under the Constitution to authorize the taking of possession, control, and operation of said cable systems under the circumstances existing at the time of said seizure; (*c*) that said seizure was not reasonably necessary for the national security or defense; (*d*) that said seizure deprived complainant of its property without due process of law and took complainant's private property for public use without just compensation; (*e*) that the said seizure was unreasonable and arbitrary, and not for public use; (*f*) that the defendant Burleson is not an impartial tribunal to determine the compensation for the use of said cables and that proper and legal provision has not been made for paying complainant said compensation, nor even permitting complainant to keep the regular profits of its said property (R. 815, 816, p. 3);

That the war referred to in the Joint Resolution was terminated beyond possibility of continuance

on November 11, 1918, by the armistice; that said Proclamation did not become a Proclamation and was not proclaimed or announced, signed, countersigned, or made public or effective until about November 16, 1918, and no seizure of said cables was attempted until such date;

That the seizure of said cables is not necessary for the national security or defense and that it will not be furthered thereby, the said security and defense having been fully attained by the signing of said armistice and the discontinuance of hostilities thereunder; that complainant during the period of the war was and still is giving adequate, complete, quick, and correct cable service to the United States, giving precedence to all Government messages, and that there has been no complaint of its operations; and that the service will not be increased or bettered but will be less efficient and satisfactory, both to the Government and the public, under the defendant's operations (R. 815, 816, p. 4);

That the United States ever since America has entered the war has controlled the American ends of complainant's cables through United States officials, particularly the Director of Naval Communications, and no operations have been had without the knowledge and approval of said director; that every request and suggestion made by him or his representatives has been promptly carried out in every particular; that the United States Government has exercised a rigid censorship over said cables and that complainant has heartily cooperated therein and

complied with every demand and request of the Government in behalf of the national security and defense (R. 815, p. 5, 816, p. 4);

That the claim that free communication of cablegrams between America and Europe in connection with peace negotiations justifies the seizure of cables could not apply to the seizure of cables other than those to Europe;

That the Joint Resolution of Congress and the acts of the defendant thereunder are unconstitutional, illegal and void because the fixing of compensation by an impartial jury or commission is not provided for therein, but that under the authority given to the President the same will be determined by the defendant Burleson;

That this was done in the case of the Postal Telegraph Cable Company, the system of which has been heretofore seized under the said resolution;

That the defendant Burleson is prejudiced, is interested in giving an unfair, unreasonable and inadequate compensation because he has for years advocated Government ownership of telegraphs and cables, and that the less he gives to complainant the more he keeps for the Government;

That the provision for appeal to the Court of Claims is an illusory remedy because no appropriation has been made for paying any judgment which may be rendered thereby and there is no compulsory process by which it can be collected (R. 815, p. 6; 816, p. 5);

That all of the cable systems, including complainant's, have landings in the territories of foreign nations, which will not permit the United States Government to control the same, and that even if the defendant Burleson should obtain the consent of said nations such provisions would constitute in effect a treaty, which could only be made with the advice and consent of the Senate, which has not been obtained; that any action without such consent violates the Constitution of the United States; and that all of this jeopardizes orator's cables, cable landings and relations with foreign governments, the disruption of which works to it an irreparable injury (R. 816, p. 7).

The Commercial Cable Company averred that the defendant Burleson was proposing to intermingle, unite, and merge its business, staff, organization, employees, and equipment with that of the Western Union Telegraph Company, so that its separate identity, business, and good will would disappear and it would be forced or persuaded to abandon competition and to acquiesce in the defendant's plans for Government ownership, or for the amalgamation of all cables in the Atlantic Ocean; that the defendant is working out a plan for universal wire service, and that all this would be in violation of the Antitrust act of Congress of July 2, 1890 (R. 815, p. 7).

Both complainants averred that their marine cables are private property, were being taken by the defendant, not for public use, and in violation of the Constitution of the United States;

That there was no necessity for the exercise of the power by the Government in taking said cables and no provision made for any judicial inquiry as to the necessity for such seizure and taking; that the same is arbitrary and in violation of the Constitution of the United States guaranteeing due process of law; and that the suit is one brought to enforce a claim against real or personal property within the Southern District of New York;

That the complainant has no remedy at law, or the ability or adequate means of resistance, and will suffer great and irreparable injury.

The prayer is for an injunction enjoining the defendant Burleson, his officers and agents, from carrying out his claim that he has taken possession and assumed control of said marine cable systems, or from interfering with complainant's property or business, or from taking any steps or making any demands upon complainant in connection therewith, and for general relief. (R. 815, p. 8; 816, p. 7.)

An amendment making Newcomb Carlton a defendant alleged that he, representing the defendant Burleson, had made demand upon complainants and had taken possession and control of complainants' lines; that the two defendants, Burleson and Carlton, were illegally withholding said property from complainants and were in illegal possession thereof. (R. 815, p. 13; 816, p. 12.)

The defendants moved to dismiss both of said bills upon several grounds (R. 815, p. 19; 816, p. 18), which may be stated as follows:

To the bill as a whole,—

First, that the possession taken through the defendants, as shown by the bill, has been taken by the President in the exercise of his executive discretion under said resolution, is possession by the United States and not by defendants as individuals; that the possession and rights involved are those exclusively of the United States and of the President in the exercise of his executive duties; and that the District Court of the United States for the Southern District of New York has no jurisdiction to entertain the bill as amended, to which neither the United States nor the President is or can be made a party.

Second, no valid cause of action in equity is stated.

The remaining grounds moved to strike certain parts of the bill as irrelevant, impertinent, or scandalous.

They present the following questions, which are considered in the brief:

That the date of the Proclamation of the President, stated in it, is conclusive, and all allegations attacking the same are irrelevant and impertinent;

That the allegations that the armistice ended the war, and that it ceased within the meaning of the Resolution on November 11, 1918, are not correct as matter of law, and are impertinent and unfounded;

That the Proclamation of the President declaring that the taking possession of the cables was necessary for the national security or defense was conclusive on that subject, and the allegations seeking to traverse the fact and asserting that the Resolu-

tion was unconstitutional because not providing for a judicial determination thereof are unfounded and impertinent;

That all allegations that defendant Burleson is prejudiced, or that he will fix the compensation of complainants and is an improper person so to do, are unfounded and impertinent;

That the allegations attacking the method of fixing compensation and charging that the remedy in the Court of Claims is illusory because no provision exists for enforcing the judgment are unfounded and impertinent;

That the allegations that the taking of these cables is for purposes other than those stated in the Proclamation are impertinent and scandalous.

The remaining questions raised by the grounds of the motion need not be considered in the case as now presented.

After argument the court, without passing upon the question of jurisdiction, dismissed said bill upon the ground that the same did not state a cause entitling complainants to relief (R. 815, pp. 23—31; 816, pp. 21–30).

ARGUMENT.

I.

Unless the action of defendants in holding possession of the cables is a trespass, without warrant of law, and the case simply one to restrain such trespass, the suit is one against the United States and the President, and can not be maintained.

Where a suit at law is brought against persons to recover property wrongfully held by them, and they set up a legislative act or an Executive order as a defense, if such act is unconstitutional or such order illegal it is no defense. In such case the suit is deemed one against the individuals only. *United States* v. *Lee*, 106 U. S. 196.

If one in possession is threatened by Executive or official action which is attacked as being, for above reasons, illegal and without authority, injunction may restrain such act or mandamus may command a plain duty involving no discretion when withheld by an officer because of such unconstitutional act or illegal order. *Dodge* v. *Woolsey*, 18 How. 331; *Board of Liquidation* v. *McComb*, 92 U. S. 531.

If the suit is one which would call for a decree controlling the action of persons not parties, or passing upon titles with a view to binding the Government and adjudging its rights, the suit can not be maintained, as the Government can not be sued without its consent. *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446;

Belknap v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Louisiana* v. *Garfield*, 211 U. S. 70.

This being a bill in equity, all persons having an interest in the subject matter, who are not formal parties, should be made parties to the suit. *Barney* v. *Baltimore City*, 6 Wall. 280; *Ribon* v. *Railroad Companies*, 16 Wall. 446, 450.

The District Court, however, held that a decision of this question was not necessary, doubtless treating the bill as one simply to restrain an alleged trespass, and dismissed the bill on its merits. The decree of dismissal was correct.

II.

The court below held that this case was within the judicial power of the United States, and decided it on its merits; it did not hold the controversy presented in the bill nonjusticiable.

The appellants, throughout their brief, assert that the District Court held the controversy presented by the case to be nonjusticiable and denied that the judicial power of the United States extended to this controversy.

This assertion is entirely erroneous. It confounds the controversy in the case with the character of one of the facts involved in the controversy. It confuses the holding by the court that the finding of the President as to that fact must be conclusively accepted as true, in passing on the entire case, with the decision of the court of the controversy on con-

sideration of this fact, so conclusively existing, with the other facts alleged.

The controversy was that the cables were claimed to have been illegally taken and to be withheld without payment. The illegality charged was that (*a*) no necessity to take for the national security or defense existed, (*b*) that the war had ceased, (*c*) that defendant Burleson had taken for an ulterior and illegal purpose, (*d*) that no reasonable compensation had been provided.

The court refused to hold that the suit was one against the United States or against the President, and considered and decided the case on its merits.

In so passing on it, he held that the President's decision that his action was necessary for the national security or defense was the decision of a political and not a judicial question, and conclusive on the court.

The court passed on the contention that the war had terminated within the meaning of the Resolution, holding that the facts alleged did not show a termination, and further that the Resolution fixed the exchange of ratifications of a treaty of peace as the limit of time within which the President could exercise control.

It also passed on each other contention. It held that the facts did not show that Mr. Burleson had had the question of fixing compensation left to him;

That the President was to fix the compensation in the first instance; but that provision for judicial

determination was made by the United States permitting suit against itself in the District Court or the Court of Claims, at the claimant's election;

That the good faith of the United States stood pledged to pay the award, and that therefore due process of law was awarded and provision for payment of compensation made;

That the contention of the bill as to the purposes of the Postmaster General was not material, as the President was the official who was acting, and he had declared the existence of the necessity for action;

That the bill, therefore, presented no cause of action against the defendants and should be dismissed.

This shows a trial on the merits, applying to the alleged facts the rules of law as to the force to be accorded to political action and the due weight to be given other allegations.

Another fallacy of contention is that complainants assume that the court held that the *controversy* presented by the case was of a political nature, because it held that one of the facts alleged presented a question of a political nature. They confuse the point presented in deciding the nature of this one question with the entire controversy presented by the case.

The logic of complainant's contention would be that if the litigation involves property rights, then every question raised in the case becomes justiciable in the sense that the court may for itself

examine the same and reverse the holding made by any other department in respect thereto.

Every case in which this Court has held a question to be political or legislative, and the Executive or legislative action thereon not open to review by the courts, has been some justiciable cause involving property or personal rights.

In the embargo cases the rights of property were involved, and if the President had erroneously decided that the public security required an embargo, and the courts could have so decided, it would have controlled the decision. Yet in such cases the question was held to be political and the decision of the Executive conclusive on the judiciary.

In cases of condemnation of private property for public use the question is strictly one of property rights, yet the decision of the legislature that the property is needed for the public use is conclusive on the courts.

That a court considers the Executive or legislative decision of a political question conclusive evidence in a case is not a refusal to try the *case* or a holding that the controversy presented by the case is not justiciable.

The application of this distinction in considering the allegations of complainant's brief on this subject is earnestly requested.

III.

The Congress has power to regulate and, if it deems best, provide for acquiring and operating the cable systems.

From their inception Congress has recognized the public relation of the telegraph lines and the probability that the Government might operate them.

The United States owned, financed, and sold the first telegraph line. Act of March 3, 1843, c. 84, 5 Stat. 618; act of June 19, 1846, c. 31, 9 Stat. 19; act of Aug. 10, 1846, c. 175, *ib.* 85, 89.

During the Civil War Congress authorized the President to take over the railroads and the telegraph lines. Act of Jan. 31, 1862, c. 15, 12 Stat. 334.

In 1866 Congress passed "an act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes." Act of July 24, 1866, c. 230, 14 Stat. 221.

After granting to telegraph companies the right to construct, maintain, and operate lines across the public domain, and over and along military or post roads of the United States then or thereafter declared such, and over, under, or across the navigable streams or waters of the United States, it provided that the United States might at any time after five years from the date of the passage of the act purchase all the telegraph lines of companies taking the benefit of it, at an appraised value, for "postal, military, or other purposes."

The limit of five years was stricken from the act, and it now exists, without limit of time for exercise, as Revised Statutes, secs. 5263, 5267.

This Court in the case of *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1, 9, upheld this act as a legitimate exercise of the power of Congress "to regulate commerce with foreign nations and among the several States (Const. art. 1, sect. 8, par. 3), and to establish post-offices and post-roads" (*id.*, par. 7).

This Court said (p. 10):

> Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 id. 489, 772; 13 id. 365; 14 id. 292).

While there is still a great mileage of cables in the hands of private companies in foreign countries, Great Britain, France, and other European countries own submarine cables as a part of their postal systems. *Submarine Telegraphs* (Bright), pp. 194 *et seq.*

The importance of cable lines to Government has been recognized by this country.

The first trans-Atlantic cable (1857), although not owned by either Government, was laid by the United States frigate *Niagara* and the British warship *Agamemnon*.

The protection of submarine cables has been provided for by convention entered into between the United States and nearly all the countries of the world. 24 Stat. 989–1000.

The Congress has three constitutional sources of power to control and, if deemed more expedient, to operate the telegraph lines—both land and submarine—belonging to citizens of the United States:

(*a*) The power to regulate interstate and foreign commerce.

(*b*) The control over inter-communication through post offices and post roads.

(*c*) The power to declare war, to raise and equip armies, and to provide means for the successful carrying on and conclusion of such war, and the maintenance and welfare of such armies.

The Joint Resolution of Congress directing the President to control or operate these cables, in his discretion, until the exchange of ratifications of a treaty of peace, if in his opinion necessary for the national security or defense, is therefore an exercise of constitutional power.

IV.

This Resolution does not delegate legislative power. It declares the legislative will that the cables should be taken whenever the national security or defense requires it, and it directs the President to ascertain when such condition exists and to exercise the power granted upon ascertaining, by the exercise of his judgment, the existence of such state of facts.

That such a conferring of power is not the delegation of a legislative function is settled.

The legislature enacts that whenever the President ascertains that the national security or defense requires this action he shall act.

The language here used is strikingly similar to that construed by this Court in *Field* v. *Clark*, 143 U. S. 649 (the reciprocity clause of the Tariff Act of October 1, 1890, 26 Stat. 567, 612). The act provided that—

> * * * whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, etc.

The Court said (pp. 693–694):

> * * * Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. * * *
>
> "The true distinction," as Judge Ranney speaking for the Supreme Court of Ohio has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made."

Section 20 of the Act to Regulate Commerce of February 4, 1887, 24 Stat. 379, c. 104, as amended by the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, authorized the Interstate Commerce Commission to request reports from all carriers engaged in interstate commerce, to prescribe the manner in which they should be made, and to require answer to such specific questions as the Commission needed information upon. The Commission was authorized, in its discretion, to do many things in relation to this subject, and to prescribe the form of all accounts, records, and memoranda to be kept by

the carriers. The act was attacked as a delegation of legislative power. This Court said:

> Furthermore, it is said that such construction of section 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. (*Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 214.)

This ruling was repeated in *Kansas City Southern Ry.* v. *United States*, 231 U. S. 423, 438, 443.

The President, in determining that the occasion had arisen for taking possession, was ascertaining if the condition existed upon which Congress desired action. It was not the exercise of a legislative function. The legislature can leave to executive officers the time and method of putting its general action into effect and clothe them with a wide discretion.

For a review of cases in which powers were vested in the President to take action when he deemed the necessity existed see *Union Bridge Co.* v. *United States*, 204 U. S. 364, 378–384.

On the general subject see also *United States* v. *Grimaud*, 220 U. S. 506.

V.

The courts have no power to review the President's decision that the necessity existed to take possession of the cables.

The judgment of Congress, as expressed in the Resolution, and the existence of necessity for action by the President under such Resolution, were not justiciable.

The taking possession of these cables was a branch of the power of eminent domain. The determination of necessity to exercise the power of eminent domain is for the legislature, or the agents to which it may delegate it, and is not the subject of judicial interference.

In *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557, 568, this Court, speaking through Mr. Justice Brewer, said:

> * * * In many States the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Boom Company* v. *Patterson*, 98 U. S. 403, 406; *United States* v. *Jones*, 109 U. S. 513; *Cherokee Nation* v. *Kansas Railway Company*, *supra* [135 U. S. 641].

And in *Adirondack Railway Company* v. *New York State*, 176 U. S. 335, 349:

> * * * The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government, and this must obviously be so where the State takes for its own purposes.

The fixing of compensation where parties can not agree is a justiciable matter and a mode of trial must be provided, but need not provide for jury trial. Many modes are sufficient. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569.

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, the Court said:

> * * * The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial.

This Joint Resolution recognizes and illustrates this distinction.

In enacting that the taking of this property for the public use is necessary whenever the President, during the period ending with the ratification of the treaty of peace, shall deem it necessary for the national security or defense, Congress is dealing with a matter not judicial, and one in which the determination of itself and the President is final.

In providing for the compensation to be paid it recognizes that this is a judicial question, and provides for the fixing of the compensation by suits in the District Courts or the Court of Claims under the sections of the Judicial Code providing therefor.

The case of *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, and like cases are entirely out of point on this question. The controversies between shipper and carrier and between the public and carriers which the Commission hears and decides are really justiciable in character.

The Act to Regulate Commerce and its amendments constitute the Commission as to these matters a quasi-judicial body.

> The statute gave a right to a full hearing and that conferred the privilege of introducing testimony and at the same time imposed the duty of deciding in accordance with the facts proved. (*Ib.* 91.)

It is because unreasonable rates fixed by a legislature or commission deny reasonable compensation for the use of private property for a public purpose that such rates are the subject of judicial inquiry to decide if they are confiscatory or not.

The difference between questions of this character and the decision of whether the exigency of the national security or defense, or any other public need, called for a taking of property is obvious. Cases of the one class are not authorities in point as to the other.

The decision of what is necessary for the national security or defense, and of the occasion for taking action, is not a judicial, but a legislative or political, function and not subject to judicial review.

As far back as 1794 Congress invested the President in the matter of embargo with power quite like, and fully as large as, that conferred by the Joint Resolution of 1918. *The Brig Aurora*, 7 Cranch 382.

In 1795 Congress under the power vested in it to call the State Militia into the service of the United States empowered the President to call out the militia when he deemed that the national security required. Act of February 28, 1795, c. 36, 1 Stat. 424. In passing on the act and the President's power thereunder this Court said in the case of *Martin* v. *Mott*, 12 Wheat. 19, 28:

> * * * The constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or

scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." * * *

The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress.

(p. 31) * * * The law does not provide for any appeal from the judgment of the

President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse.

* * * * *

* * * When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver, that the act which he might rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.

While the determination of facts which involve the putting into operation of legislative or executive action might be left to the courts, they can also be confided to executive officers for decision, and such

decision is conclusive on the courts. *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

For other cases holding the decision of executive officers conclusive:

Marbury v. *Madison*, 1 Cranch 137.
Fong Yue Ting v. *United States*, 149 U. S. 698.
Lem Moon Sing v. *United States*, 158 U. S. 538.
The Japanese Immigrant Case, 189 U. S. 86, 98.
Bates & Guild Co. v. *Payne*, 194 U. S. 106.
West v. *Hitchcock*, 205 U. S. 80.
Moyer v. *Peabody*, 212 U. S. 78.
Ness v. *Fisher*, 223 U. S. 683.
Louisiana v. *McAdoo*, 234 U. S. 627.

The contention that the courts may review the President's finding that the necessity for action exists, seeks to convert a question for legislative and political decision into a justiciable question, which may be raised by any person affected by the President's action, and to have the necessity decided by a court, or a court and jury, instead of by the branches of the Government to which it belongs and to whom it is confided.

> If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy and not of order. (*Luther* v. *Borden*, 7 How. 1, 43).

A recital of the principal acts passed by Congress since the existence of the present war, wherein the

powers granted are to be exercised when deemed necessary by the President, will demonstrate the paralysis which would result from holding that his decision that the necessity had arisen was subject to judicial review. A summary of these acts is printed as appendix A to this brief (*infra*, pp. 45–48).

VI.

The power vested in the President is one which properly appertains to his duties as Commander-in-Chief.

In authorizing the President during the continuance of the war, until the exchange of the ratifications of a treaty of peace, to supervise, control, or take possession of the public utilities, including submarine cables, specified in the Joint Resolution, whenever he deems it necessary for the national security or defense, Congress is but enabling the President to exercise, and giving its consent to his exercising, a power to take property necessary for the national security or defense which exists in a Commander-in-Chief, although he may need legislative aid for its exercise.

The President, during time of war, is charged by the Constitution with all of the duties, and is vested with the powers, incident to the Commander-in-Chief of the Army and Navy of the United States. He is also charged with the duty of negotiating the treaty of peace which ends the war. In this case the conduct and activities of this war cover practically every quarter of the globe. We have possessions and mili-

tary and naval forces in Asia, the Philippine, Hawaiian and other Islands, and Russia, as well as France and other countries of Europe. The defense of the country, proper command and direction of the military and naval forces of the United States, are conducted largely through cables.

In the stage of the war now reached the negotiations between many nations of the world and the United States must be conducted largely over cables. Conceding the existence of a reasonable necessity to use the cables for the security and defense of the United States, it is clear that their use would be largely one for the Commander-in-Chief of the military and naval forces and the Executive responsible for negotiating a treaty.

It is therefore clear that this power is not merely vested in the President as an agency of the legislative department, but is vested in him by the legislative department because of the duties resting upon him as Commander-in-Chief and the treaty-negotiating organ of the Government.

The opinion of the court in this case ably sets out this view—opinion of Judge Hand, R. 815, pp. 27–30.

VII.

The President's Proclamation was conclusively issued as of its date and the property was taken "for the duration of the war."

It is insisted that the date in the President's Proclamation fixes its effective date, and that no inquiry will be permitted upon the subject. In *Lapeyre* v.

United States, 17 Wall. 191, 200, this Court said, relative to the effective date of a Presidential proclamation:

> The only way to guard against these mischiefs is to apply the same rule of presumption to proclamations that is applied to statutes, that is, that they had a valid existence on the day of their date, and to permit no inquiry upon the subject. Conceding publication to be necessary, the officer upon whom rests the duty of making it should be conclusively presumed to have promptly and properly discharged that duty.

The Presidential Proclamation is itself a taking possession of the properties mentioned therein. It recites (R. 815, p. 11):

> Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States or any State thereof, including all equipment [etc.].

The President thereupon directed that the—

> supervision, possession, control and operation of such marine cable systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson (R. 815, p. 11).

The Proclamation further provided (R. p. 11) that—

> until and except so far as said Postmaster General shall from time to time, by general or special orders otherwise provide, the owners, managers, board of directors, receivers, officers, and employees of the various marine cable systems shall continue the operation thereof, [etc.]

It also provided (R. p. 11):

> From and after 12 o'clock midnight on the 2d day of November, 1918, all marine cable systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice.

It is insisted that this Proclamation accomplished the taking of possession of said cables fully and completely as of the date November 2, 1918.

But if such conclusive presumption could be traversed, and if it could be assumed on this hearing that the allegation that this possession was taken actually on November 16, 1918, was true, this would in no wise alter the fact that the possession was taken "for the duration of the war" within the meaning of said Resolution and of the law.

First, the Resolution really defines what is meant by "the duration of the war" in such Resolution. The time lasts until the date of a Proclamation by the President of the exchange of ratifications of a treaty of peace.

Second, this is in accordance with the rule of law defining the duration of a war.

In *Hijo* v. *United States*, 194 U. S. 315, 323, this Court said:

> * * * It [the action] is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. "A truce or suspension of armies," says Kent, "does not terminate the war, but it is one of the *commercia belli* which suspends its operations. * * * At the expiration of the truce, hostilities may recommence without any fresh declaration of war." 1 Kent, 159, 161.

"In a foreign war, a treaty of peace would be the evidence of the time when it closed." *United States* v. *Anderson*, 9 Wall. 56, 70.

An armistice recognizes a state of war as continuing. It does not relieve the citizens of the belligerent countries from the character of enemies. They can only act otherwise so far as the terms of armistice provide. (See opinion of Judge L. Hand and authorities cited; R. 815, pp. 27, 29.)

The contention that the necessity to provide for the national security or defense must end with a suspension of active hostilities is untenable.

The language of Congress is significant.

If it had intended this meaning why use the word "security"?

The last word "defense" would seem to be sufficient to cover the peril from external foes.

Unless more is intended, the use of the word "security" would seem superfluous.

The national security would cover many things. It would cover widespread strikes, anarchistic propaganda, domestic disturbance, the prevention of disorder arising from demobilization, etc.

Because its first purpose may have been to meet the exigencies of actual hostilities, the further clear provision and purpose to protect the national security until final peace was formally concluded must not be lost sight of.

If Congress had meant the suspension of actual hostilities with Germany, or the Central Empires, as the term of this Resolution it would have said so. On the contrary, it declared that it did not mean by the duration of the war the period of actual hostilities, but that it used the term in the legal sense, "until the exchange of ratifications of a treaty of peace."

This clearly shows that the cessation of active hostilities was not to terminate the power conferred.

It also shows that more is meant than defense against external foes in its care for the national security; that it meant the President to have this power during that critical time when the world's peace was being settled, so that the national security at home and abroad could be guarded.

The claim that such a definition of the term "security" might stretch the term of the President's control over years is refuted by the fact that the

Resolution ends the control on the exchange of ratifications of a treaty of peace.

Again, Congress can by repeal or amendment control the continuance of such operations.

VIII.

The exercise of the power to take possession was not arbitrary.

While it is urged most earnestly that the necessity for the exercise of this power is not subject to judicial review or interference on the ground that it was arbitrary, it is nevertheless insisted that the facts stated in the bills of complaint, as well as public history, show the reasonableness of its exercise. Complainants' bills aver that a very extended control of these cables has been exercised by the military and naval departments of the Government practically from the beginning of the war. One of the reasons alleged why the present action is unnecessary is that so much of control or regulation exists. One bill also alleged, without denying its necessity, that the Department of State found it necessary on October 29, 1918, to require the exclusive use of one of the cables and that the same was set apart for such exclusive use, showing the increase of Government use and the increased necessity for Government control. The suspension of active hostilities on the Western front has not brought a cessation of hostilities everywhere, but they exist in Russia and perhaps elsewhere. The very terms of the armistice have projected the armies

of the United States farther east into Germany. The condition of all of central Europe is one of very great unrest and uncertainty. The demands from the movements of troops incident to demobilization and the maintenance of a very considerable army in France are great. Again, the suspension of hostilities has not necessarily suspended the most active propaganda, nor a great increase of the demands upon the cables by the civilian population.

It is widely charged and largely believed that the most serious efforts to create discord, dissatisfaction and want of harmony between different elements within the United States, as well as in Europe, will be the present phase of the war. The care for the national security and defense is not confined to the Western front in Europe. It covers our military and naval forces in the Pacific, in our insular possessions, on the continent of Asia, in Russia—everywhere—and also "security" within our borders. It is therefore easy to see how, under all these circumstances, it would be deemed that the control and supervision of the operations of the cables existing at the date of the President's Proclamation were less adequate to the security or defense of the United States than the actual operation and possession which that Proclamation inaugurated.

But this actual possession only changed the degree of exercise of power by the President of the United States rather than called into exercise a new power; and the real complaint is, not that supervision, control, possession, or operation of the cables by

the United States Government is not necessary for the national security or defense, but that the present extent thereof is not necessary, and that a sufficient control was already being exercised.

It is submitted that this is a confession of the existence of the necessity for the exercise of the powers of the resolution of Congress for the national security or defense, and, that being the case, the extent to which these powers shall be used is not a subject for litigation, but of executive discretion.

IX.

An inquiry into the motives of the President will not be permitted.

> By the Constitution of the United States, the President is invested with certain important political powers in the exercise of which he is to use his discretion, and is accountable to his country in his political character and to his own conscience. (*Marbury* v. *Madison*, 1 Cranch, 137, 165.)

This Court has repeated the ruling that an attack on the motives of Executives was immaterial and inappropriate.

> We pass by both as immaterial and inappropriate any consideration of the motives that induced the action of the Governor of Colorado. This Court will not inquire as to the motives which guided the chief magistrate of a state when executing the functions of his office. (*Pettibone* v. *Nichols*, 203 U. S. 192, 203.)

X.

The Resolution makes due provision for compensation.

This Resolution was passed by Congress under its war powers, and the real question is whether it made provision for compensation which would be sufficient under the exercise of such war powers. We insist that not only was the provision made sufficient under the war powers but that it was sufficient under the rules governing the ordinary taking of property for public use in time of peace.

The Resolution provides that the President shall, in the first instance, name the compensation to be paid, but that this is not a binding award. On the contrary, it may be rejected, and the owner of the cables may at once, without prejudice to his right, receive 75 per cent thereof and institute suit under the provisions of the Judicial Code, section 24, paragraph 20, in a United States District Court, or, under section 145 of the Judicial Code, in the Court of Claims. This provides for sufficient judicial ascertainment of the compensation. A provision for trial by jury is not necessary. *Bauman* v. *Ross*, 167 U. S. 548, 593; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569; *United States* v. *Jones*, 109 U. S. 513, 519; *Kohl* v. *United States*, 91 U. S. 367, 375, 378. Nor need payment or appropriation therefor be made in advance of seizure.

Where the United States used certain patents in the manufacture of field guns and carriages without having paid compensation therefor, and the owner

sought an injunction, it was held that in view of the character of the patents

> and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides. (*Crozier* v. *Krupp*, 224 U. S. 290, 305.)

The means of compensation here provided was that where such a patent or lawful right was used without a license by the United States the owner might recover for such use in the Court of Claims; and it was held in this case that while as a general rule, but not inflexibly, compensation should be first ascertained and paid (p. 306),—

> * * * that again always having reference to the nature and character of the property taken, its value, and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end.

This Court has recognized the difference existing between State constitutions which require antecedent payment of compensation and the provision of the Constitution of the United States.

> The constitutions of some of the States expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the constitution of Massachusetts nor the Constitution of the United States contains any such provision. The former only requires that the owner "shall receive a reasonable compensation;" the latter, that private property shall not be taken for public use "without just compensation." Reasonable compensation and just compensation mean the same thing. (*Sweet* v. *Rechel*, 159 U. S. 380, 400.)

The language of many State decisions is due to this difference.

The text writers recognize this difference, and also that where the State itself is taking the property a provision for adjudging compensation is all that is necessary, the public faith being sufficient security for payment.

> When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain, that it shall provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. (Cooley's Const. Lim., 6th ed., p. 692.)
>
> It is well settled in most jurisdictions that, in the absence of a specific requirement in the constitution, compensation need not be paid

> or even finally determined in advance of the taking, provided, however, that reasonable, certain and adequate provision be made at the time of appropriation to ascertain and secure the compensation to be paid to the owner. The owner must be put to no risk or unreasonable delay as to his compensation. When the taking is made by the State or by a municipal corporation, no special security is required, since the public faith is pledged. (10 R. C. L., sec. 110, pp. 125, 126.)

This rule is recognized in the case of *Sweet* v. *Rechel*, *supra* (p. 401). The reason for holding that where means of judicially ascertaining reasonable compensation is provided antecedent appropriation is not necessary in the case where the public is the taker arises from the fact that the legislative power stands behind the judgment when rendered and can as effectively require payment as could a process. The case is not one where the payment is left to the persons who are litigants.

The charge made in these bills that the remedy by suit in the Court of Claims is illusory because no compulsory means for payment of the judgment is provided is at last an imputation of the good faith of Congress, and must assume that after providing for suit against the United States it would fail to respect the judgment of its own courts. The language of this Court can best dispose of this position.

In speaking of the adequacy of the right to resort to the Court of Claims, this Court, while not making any direct decision on the particular facts of the case

under consideration, said in *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 599:

> * * * It is to be assumed that the United States is incapable of bad faith, and that Congress will promptly make the necessary appropriation, whenever the amount of compensation has been ascertained in the mode prescribed by the act.

In the same case the Circuit Court said:

> It is also true that Congress has always heretofore appropriated the money required to pay the judgments of the Court of Claims; and as it has specially designated that court as the tribunal to ascertain what amount shall be paid to the complainant, nothing but a flagrant breach of good faith could delay the payment. (*Great Falls Mfg. Co.* v. *Garland*, 25 Fed. 521, 530.)

The instance of the Commercial Pacific Cable Company's claim for injury to a cable given in the bill (Rec. 816, p. 6) is wholly irrelevant. It was a claim not within the jurisdiction of the Court of Claims for final judgment; but was a claim in tort referred to the Court of Claims by Senate resolution for a report on the facts under act of March 3, 1887, 24 Stat. 505, 507. The court made a report on the facts, including the amount of damages, and expressed the opinion that it was a case of negligence for which Congress should recognize a liability. But it held it had no jurisdiction to render any judgment and that the case was one for Congressional action

one. *Commercial Pacific Cable Co.* v. *United States*, Ct. Cls. 461.

A seizure for military purposes in the theater of erations may be made without any express pro- sion for compensation. The implied obligation in e United States to pay for the use of property ized and the establishment of the Court of Claims, ith jurisdiction to determine the amount, consti- ute sufficient provision for compensation. *United tates* v. *Russell*, 13 Wall. 623.

The temporary *use* of this property, and not title, the thing taken. The provisions for ascertainment f compensation by judicial procedure in case of dis- greement and the good faith and settled practice of he Government in paying such judgments would seem o be as full a provision as could be made in advance. Congress has repeatedly adopted this as a sufficient nethod for the ascertainment and the payment of ust compensation. (See Appendix B, *infra*, p. 49.)

XI.

The Sherman Act and amendments are wholly inapplicable.

It is a settled principle that unless included ex- pressly, or by a clear implication arising out of the nature of the provision, a statute does not apply to the Government. *United States* v. *Knight*, 14 Pet. 301, 315; *Savings Bank* v. *United States*, 19 Wall. 227, 239.

It is also manifest that an act intended to prevent monopoly in the hands of private individuals conduct-

ing business for personal profit, and to promote competition between such businesses as a method of controlling private interest, can have no application to the operations of the instruments of such business by the Government.

On the contrary, it can be well conceived how the taking over of one or more of these cables and leaving others for private operation might greatly embarrass an economical operation of the cables taken by the Government, or do great injustice to the owners left to operate in competition with the Government.

It is respectfully submitted that the decree of the District Court in each of the cases should be affirmed.

ALEX. C. KING,
Solicitor General.
G. CARROLL TODD,
Assistant to the Attorney General.

MARCH, 1919.

APPENDIX A.

SUMMARY OF ACTS GRANTING DISCRETIONARY POWERS TO THE PRESIDENT.

Act of May 18, 1917, c. 15, 40 Stat. 76 (Selective Draft Law), authorizing the President, among other things,

To draft—

500,000 men or such part thereof "*as he may at any time deem necessary*" (*Ib.* 76).

500,000 men additional, "*in his discretion*" (*Ib.* 77).

Such recruit training units "*as he may deem necessary for the maintenance of such forces* [500,000 men] *at the maximum strength*" (*Ib.* 77).

Also—

Organize machine-gun companies, and a motor-car machine-gun company, "*in his discretion*" (*Ib.* 77).

Recommission former Revenue-Cutter and Coast Guard men, "*in his discretion*" (*Ib.* 77).

Raise artillery units, "with such numbers and grades of personnel *as he may deem necessary*" (*Ib.* 77).

Establish, "*in his discretion,*" more than one draft board in a Federal judicial district (*Ib.* 79).

Discharge officers, if reported upon adversely by the Board, "*at the discretion of the President*" (*Ib.* 82).

Discharge officers "for any cause which, *in the judgment of the President,* would promote the public service" (*Ib.* 82).

Regulate the prohibition of alcoholic liquors near military camps, as he may "*deem necessary or advisable*" (*Ib.* 82).

Act of May 22, 1917, c. 20, 40 Stat. 84, 85, authorizing Appointment, *in the President's discretion,* of additional commissioned officers in the Navy and Marine Corps.

Act of June 12, 1917, c. 27, 40 Stat. 105, 121, appropriating 00,000, to

Enable the President to aid State and local boards, or otherwise, "*in his discretion,*" in preventing the spread of epidemics.

Act of June 15, 1917, c. 29, 40 Stat. 182, conferring power on the President to,

Contract for such ships or material "as the necessities of the Government, *to be determined by the President*, may require during the period of the war," etc.

Modify, etc., such contracts.

Take the product of shipbuilding plants, etc.

Requisition and take over such plant or plants, or any parts thereof.

Acquire ships under construction, etc.

Use any plant, ship, etc., at such times and in such manner as the *President may deem "necessary or expedient"* (*Ib.* 183).

Act of June 15, 1917, c. 30, 40 Stat. 217, 220, authorizing Control of vessels in U. S. ports, *as the President "may deem necessary."*

Act of July 24, 1917, c. 40, 40 Stat. 243, authorizing Such number of men for the Signal Corps *as the President "may deem necessary."*

Act of August 10, 1917, c. 53, 40 Stat. 276 (Food and Fuel Control Act), containing various authorizations, among them the following:

License dealings in necessaries "*whenever the President shall find it essential.*" (*Ib.* 277.)

Purchase wheat, flour, meal, beans, and potatoes, and to sell same for reasonable prices (*Ib.* 279).

Requisition factory, packing house, oil pipe line, mine, or other plant, "*whenever the President shall find it necessary* to secure an adequate supply of necessaries for the support of the Army or the maintenance of the Navy, or for any other public use connected with the common defense" (*Ib.* 279).

Fix price of wheat, "*whenever the President shall find that an emergency exists* requiring stimulation of the production of wheat," etc. (*Ib.* 281).

Purchase wheat, for which price is guaranteed, "*whenever he deems it essential to protect the Government of the United States*" against enhancement of liability (*Ib.* 281).

Fix price of coal and coke "whenever and wherever *in his judgment necessary for the efficient prosecution of the war*" (*Ib.* 284).

Use moneys received as revolving fund, "*in his discretion*" (*Ib.* 276, 269, 280, 282, 285).

Requisition plant and business of coal or coke producer or dealer if, "*in the opinion of the President,*" he fails to conform to price fixed (*Ib.* 284).

Require producers of coal and coke to sell product only to the United States if the President "*shall be of opinion* that he can thereby better provide for the common defense, and whenever, *in his judgment*, it shall be necessary for the efficient prosecution of the war." (*Ib.* 284).

Prohibit use of food or feeds in production of malt or vinous liquors "*whenever the President shall find that limitation, regulation, or prohibition * * * is essential*, in order to assure an adequate and continuous supply * * * or that the national security and defense will be subserved" (*Ib.* 288).

Act of October 6, 1917, c. 79, 40 Stat. 345, 369, which

Places Naval Emergency Fund of $100,000,000 at disposal of the President, to secure economical and expeditious delivery of material, *as he may direct, to be expended at his direction and discretion.*

Provides for acquisition of facilities for construction of warships, including possession of and title to land, "*which he may find necessary,*" and makes an appropriation, "*to be expended at the direction and in the discretion of the President*" (*Ib.* 371).

Act of October 6, 1917, c. 106, 40 Stat. 411 (Trading with the Enemy Act), under which the President may,—

Designate additional classes of persons as included within the term "ally of enemy," "*if he shall find the safety of the United States or the successful prosecution of the war shall so require.*"

Cause communications by mail, cable, radio, etc., to be censored, "*whenever, during the present war,*" *he* "*shall deem that the public safety demands it*" (*Ib.* 413).

Revoke provisions of Trading with the Enemy Act which apply to an ally of enemy, "*if he shall find it compatible with the safety of the United States and with the successful prosecution of the war*" (*Ib.* 415).

Act of February 11, 1918, c. 15, 40 Stat. 437, which

Authorizes the President, "*in his discretion,*" to furnish certain assistance to the Dominican Republic.

Act of March 21, 1918, c. 25, 40 Stat. 451 (R. R. Control Act), under authority of which the President may

Sell securities, purchased out of revolving fund, whenever "*in his judgment it is desirable.*"

Act of March 28, 1918, c. 28, 40 Stat. 459, authorizing the President to—

> Acquire title to the docks, piers, warehouses, wharves and terminal equipment and facilities of the North German Lloyd Dock Co. and Hamburg American, etc., Co., "*if he shall deem it necessary for the national security and defense.*"

Act of April 2, 1918, c. 40, 40 Stat. 501, authorizing the President,

> "*In his discretion,*" to reduce temporarily the course of instruction at the Naval Academy.

Act of May 10, 1918, c. 70, 40 Stat. 548, which authorizes

> Sale of supplies by the President, during the existing emergency, "*in his discretion and upon such terms as he shall deem expedient.*"

Joint Resolution of September 12, 1918, c. 170, 40 Stat. 958, authorizing the President to

> Prohibit the sale, manufacture, or distribution of intoxicating liquors in zones about mines, factories, shipbuilding plants, etc., whenever "*in his opinion * * * necessary to the proper prosecution of the war.*"

APPENDIX B.

ACTS AUTHORIZING REQUISITION OF PROPERTY AND FIXING METHOD OF DETERMINING COMPENSATION BY PROVIDING THAT THE PRESIDENT FIX AMOUNT THEREOF, WITH A RIGHT TO THE OWNER, IF NOT SATISFIED, TO BE PAID 75 PER CENT AND TO SUE THE UNITED STATES FOR ADDITIONAL COMPENSATION.

Act of June 15, 1917, c. 29, 40 Stat. 182, 183:

Requisition of shipbuilding contracts, requisition or acquisition of ships, material, plants, etc.

Acquisition of Jamestown Exposition site and adjacent land (*Ib.* 207, 208).

Act of August 10, 1917, c. 53, 40 Stat. 276, 279:

Requisition foods, feeds, fuels, factories, packing houses, oil pipe lines, etc.

Commandeer distilled spirits (*Ib.* 282).

Requisition plants and business of coal or coke producers (*Ib.* 284).

Act of April 26, 1918, c. 64, 40 Stat. 537, 538:

Take over possession and title to buildings, etc., for ordnance proving grounds.

Act of May 16, 1918, c. 74, 40 Stat. 550–551:

Purchase, requisition, etc., buildings, local transportation utilities, etc., in order to provide housing for war needs.

Act of July 18, 1918, c. 157, 40 Stat. 913, 915–916:

Requisition, temporarily, vessels, dry docks, wharves, etc., for public use.

Act of October 5, 1918, c. 181, 40 Stat. 1009, 1010:

Requisition ores, metals, minerals, etc.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, appellant, *v.* ALBERT S. BURLESON AND NEWCOMB CARLTON.	No. 815.
COMMERCIAL PACIFIC CABLE COMPANY, Appellant, *v.* ALBERT S. BURLESON AND NEWCOMB CARLTON.	No. 816.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUGGESTION THAT CASES HAVE BECOME MOOT.

Comes now the Solicitor General of the United States, and makes known to the court that the bills of complaint filed in each of the above-stated cases are brought for the purpose of enjoining the taking, and holding possession, of the lines of cables and property described in said respective bills by the said defendants; and also for a mandatory injunction to require the restoration of possession of said lines of cables and property to the said complainants, respectively, by the said defendants.

116578—19

That by direction of the President of the United States said defendant Albert S. Burleson as Postmaster General did by his Executive Order dated April 29, 1919, direct that the possession of the said lines of cables and of all other property appurtenant thereto, embracing all of the property described in said bills of complaint, should be restored to the possession of their respective owners as of midnight on May 2, 1919. A copy of said order is hereto attached as a part thereof.

That the possession of said lines of cables and all other property, the subject matter of the said suits above-mentioned, was as of said date, and from midnight on May 2, 1919, restored to and has since said time been in the possession of the said complainants, respectively, as the owners thereof, and that all possession or control of said lines of cable or property by the said defendants or by the President of the United States under the Joint Resolution of Congress dated July 16, 1918, under which the possession of said lines of cable and property were taken, has ceased and terminated, and the said lines of cable and property, and the possession and control thereof, have been since said date respectively and exclusively that of the said complainants.

The prayer for specific relief in said bill is confined solely to the restoration of such possession and to the grant of injunction as prayed. The relinquishment of possession of said cable lines and property to the complainants, by direction of the President, under the said order of A. S. Burleson as Postmaster

General has accomplished everything that the grant of the injunction sought by the prayers of said bill could accomplish.

In view of the decisions of this court that it should not be called on to decide causes which have become moot cases, the undersigned deems it his duty to bring the changed condition of these cases to the attention of the Court—to suggest to the Court that the questions therein have become moot—and to submit the matter for such direction as to the Court may seem proper.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

POST OFFICE DEPARTMENT,
April 29, 1919.

ORDER NO. 3047.

The marine cable systems of the United States, and every part thereof, including all equipment and appurtenances thereto whatsoever, and all material and supplies, the possession, control, supervision and operation of which was assumed by the President by his proclamation of the 2nd day of November, 1918, to be exercised by and through the Postmaster General, Albert S. Burleson, are hereby returned to their respective owners, managers, boards of directors or receivers to take effect on midnight, May 2, 1919.

Representatives of the Postmaster General now operating said properties will take immediate steps to carry this order into effect.

By direction of the President.

A. S. BURLESON,
Postmaster General.

○

Nos. 815 and 816.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, APPELLANT,

v.

ALBERT S. BURLESON AND NEWCOMB CARLTON.

COMMERCIAL PACIFIC CABLE COMPANY, APPELLANT,

v.

ALBERT S. BURLESON AND NEWCOMB CARLTON.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

RESPONSE FOR APPELLANTS TO SUGGESTION THAT CABLES HAVE BECOME MOOT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, Appellant, *vs.* ALBERT S. BURLESON and NEWCOMB CARLTON,	No. 815
COMMERCIAL PACIFIC CABLE COMPANY, Appellant, *vs.* ALBERT S. BURLESON and NEWCOMB CARLTON	No. 816

Response for appellants to suggestion that cases have become moot.

We have received a copy of the Suggestion by the Solicitor General that these cases have become moot, and, in accordance with the permission of the Court, we make the following response:

FIRST. *It is submitted that the cases have not become moot.*

It is true that the cable systems and other property described in the "Suggestion" have been returned to the respective owners. It is equally true that the defendant Burleson may seize these cables again tomorrow. There is just as much, and just as little, reason for the seizure of the cable systems now as there was when the seizure was made on November 16, 1918. All the pretexts, and extraneous considerations, by which it was sought to justify that seizure, remain unchanged. There are still great numbers of our troops abroad, the Treaty has not been ratified, or even signed, and the Peace Conference is still in session. So far as we can see, there is just as little necessity, and just as much, for a seizure of the cable systems next week as there was last November after the Armistice. To be sure, in the public announcement of the return of the cables, there is no allusion to any of the pretexts for the seizure which were considered in the opinion below or discussed in the argument at this Bar, but reference is made only to conditions, the existence of which was absolutely negatived by the allegations of the bills of complaint which stood admitted in the record by the motions to dismiss in the court below. But while the absence of any actual necessity for the seizure, as contemplated by the Joint Resolution, stands demonstrated upon the record, and is abundantly shown by the return of the cables, it still remains true that after this appeal is out of the way the cables may be seized again with no better reason.

We repeat, then, that the cases have not become strictly moot, in view of the fact that the defendants have not admitted the illegality of the seizure, but have apparently sought by their own act to prevent a decision on the

merits, and may renew, in similar circumstances, the interference with the complainants' property.

See

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 308;
Southern Pacific Terminal Co v. *Interstate Commerce Commission,* 219 U. S. 498, 515;
Southern Pacific Terminal Co. v. *Interstate Commerce Commission,* 219 U. S. 433, 452.

In *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 477, the intervening event, that is, the outbreak of the War, which rendered the controversy moot, was referred to as an event which was due to a power "beyond the control of either party" and "by the same power any continued relation concerning it between them" had become "unlawful and impossible".

It is submitted that a "want of actuality", so as to deprive the Court of jurisdiction to decide the case upon the merits, could not be produced by the mere return of the cable systems.

SECOND. In this response, however, we are not considering the matter without regard to practical exigencies. It may be assumed that while the situation is as we have described it, and that this controls the legal question, there is little practical danger of any further attempt to interfere with the cable systems.

But the questions raised by the bills of complaint still remain of practical consequence in view of the fact that these cable systems were operated for nearly six months after the illegal seizure and that there remains a large amount of money constituting the profits of these systems during this period.

It is a fact that the moneys derived from the operation of the systems remain in the possession of the respective complainants. They have not been intermingled with other moneys or derived from other properties. These moneys have not been covered into the Treasury of the United States. Congress in its Joint Resolution of July 16, 1918, did not direct that the moneys should be paid into the Treasury, nor did Congress provide, as it did in the case of the railroads, that the moneys should be the property of the United States. Had the receipts been paid into the Treasury they could not have been used for operating expenses without proper action by Congress appropriating the moneys (Constitution, Art. I, sec. 9, sub. 7). No such appropriations were ever made. There was an entire absence in the case of the cable systems, under the Resolution of July 16, 1918, of such provision as was made with respect to the receipts from the operation of the railroads under the Act of March 21, 1918, sections 1 and 12.

Receipts in the case of the cable systems have been left with the Companies respectively and the operating expenses have been defrayed by these Companies in the usual way, and when the cable systems were returned the moneys remained where they had been, and where they should be. The actual net returns from the operation of the complainants' properties could not, in any event, be taken without just compensation and it is evident, we submit, that there could be no just compensation in a case like this which would be less than the moneys now in complainants' hands. From every point of view, the complainants are entitled to retain these moneys.

The Solicitor-General, in his "Suggestion", says that the Executive Order directed the restoration "of all of the property described in said bills of complaint". The bills of complaint describe the moneys of the complain-

ants—the receipts and profits of the operation of their systems—which the complainants denied the right of the defendants to interfere with by virtue of the illegal seizure. Now, we are not disposed to quarrel with the return of the cable systems. We are glad that they have been returned. We assume that there is no disposition to question the right of the complainants to the moneys which have resulted from the operation under the illegal seizure during the past six months. But we do not wish to have the cases dismissed as moot, that is, by virtue of the return described in the Solicitor-General's "Suggestion", in the view that there is nothing left in controversy, and then be compelled to begin all over again to contest the seizure in case claim is made to these moneys.

We may take this opportunity to say further that the complainants have no desire to make any claim against the Government, or against the defendants, with respect to the operation and possession of the cable systems, provided the complainants are left not only in the possession of the cable systems, but of the moneys derived from the operation of their own properties since the illegal seizure, that is, provided they are left precisely in the position in which, presumably, they now find themselves. These moneys have always remained in their actual possession; they have issued from their own properties respectively, without any intermingling with the receipts of any other properties; and they have been banked and held in the names of the complainants respectively.

We ask that the matters in issue be determined on the merits, unless it is entirely clear that there is no question left in dispute, including any question as to the right to these moneys by virtue of the seizure of which the bills herein complain. And, on the other hand, we are willing to stipulate that no claim will be made against the defendants or the Government by reason of the illegal

seizure, provided that the complainants respectively are left in possession of the moneys which were derived from their respective properties during the operation of the cable systems under the seizure of which they have complained in these suits.

THIRD. In *United States* v. *Hamburg-American Company*, 239 U. S. 466, the bills of complaint had been dismissed in the District Court and the Government had appealed. The outbreak of the European War made the controversy moot, but the Court was of opinion that the ends of justice required that the judgment below should not be permitted to stand when, without any fault of the appellant, there was no power to review it upon the merits, and accordingly the decree was reversed and the cause was remanded with directions to dismiss the bill without prejudice to the right of the appellant to assail any act or combination similar to that of which complaint had been made. This precedent was followed in *Berry* v. *Davis*, 242 U. S. 468, 470, and *United States* v. *American-Asiatic Steamship Co.*, 242 U. S. 537. We assume that, if the cases were treated as moot, these precedents would be followed here.

In conclusion we submit:

(1) That the cases should not be regarded as moot, but that the appeals should be determined on the merits, unless an appropriate disclaimer is filed to the effect that no claim is made to the moneys which have resulted from the operations of the cable systems of the complainants, respectively, under the seizure claimed in the bills of complaint to be illegal, and

(2) That in such case the same course should be taken as in *United States* v *Hamburg-American Co.*,

supra, and other cases, in the reversal of the decrees below and the remanding of the cases with directions to dismiss the bills without prejudice to the complainants' right to assail any interference in the future with their cable systems through similar action.

All of which is respectfully submitted.

WILLIAM W. COOK,
CHARLES E. HUGHES,
Of Counsel for Complainants.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE COMMERCIAL CABLE COMPANY, appellant, *v.* ALBERT S. BURLESON AND NEWCOMB Carlton.	No. 815.
COMMERCIAL PACIFIC CABLE COMPANY, appellant, *v.* ALBERT S. BURLESON AND NEWCOMB Carlton.	No. 816.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REASONS WHY SAID CASES SHOULD BE CONSIDERED MOOT.

Pursuant to the permission given in the order of this court directing the attention of counsel to the suggestion that the above cases have become moot, and in response to the observations of appellants, the following points are submitted by the appellees:

1. *The suits have become moot.*

These suits are filed against the appellees as individuals.

The complainants insisted, as the foundation of the jurisdiction of the court below, that these are not suits against the United States or the President, but against the individual defendants who are acting without authority.

The purpose of the suits is to recover possession of the property taken by the defendant Burleson under the proclamation of the President.

These properties have been restored to complainants' possession by direction of the President.

It is not denied that Burleson claimed no right except to carry out the President's mandate.

The order to restore possession has ended defendants' claim to possession and was recognized by them as terminating it.

It can not be insisted that they, or either of them, could resume such possession without a fresh mandate.

The direction of the President ordering the restoration of possession to complainants was compulsory on the defendants.

Hence the cases cited to show that an action can not be rendered moot by the voluntary action of a defendant are not applicable.

The authority from the President to Burleson to take possession and operate has ceased. If this court should affirm that former right defendants could not resume possession or operation, hence this court will not decide the question. *Security Life Insurance Co.* v. *Prewitt*, 200 U. S. 446, 449; *Berry* v. *Davis*, 242 U. S. 468.

Even if the President, having exercised the power to take possession and control of the cables, and then having terminated the same, could again by a new proclamation retake such possession, *he* is not a party to these causes, and as a legal proposition a decision therein to control his action and decide the rights of the Government is legally impossible and improper.

Hence the contention that the case is not moot on the ground that a new seizure *might* be attempted is not sustained.

The determination of an appeal for the purpose of establishing a rule of observance in future cases is not an exercise of judicial power. *United States* v. *Evans*, 213 U. S. 219.

In *United States* v. *Hamburg-American Co.*, 239 U. S. 466, the court quoted the following language from the decision in *California* v. *San Pablo & R. R.*, 149 U. S. 308, 314:

> The court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

2. *The title to funds can not be decided in these cases.*

The suggestion that the cases should be decided in order to determine the legal situation of the funds derived from operation, *conceded to be in the hands of the complainants*, is wholly untenable.

The insistence of complainants is that each suit is one to restrain the unlawful interference by the individuals Burleson and Carlton with the possession of complainants' properties.

It is not pretended that these individuals now assert any right to the funds in complainants' hands.

It is plain that the only possible claimant would be the United States of America.

The basis of the complainants' right to maintain each suit is that the United States *is not bound by any decree* therein, and could sue to enforce its claims regardless of any judgment herein. *United States* v. *Lee*, 106 U. S. 196, 222. Therefore no finding in this case as to these funds *now in complainants' hands* could adjudge the question complainants ask to be settled. *Sage et al., executors*, v. *United States* (decided by this court May 19, 1919).

Complainants are well aware that these defendants are without authority to bind the United States by any stipulation in these causes.

It is perfectly evident that no claim is being asserted by these defendants to such fund, and complainants concede that in the restoration of the property to them the funds were left with them in the same manner as all other property was left.

It is insisted that any decree made in this case as to the title of this fund would as between the parties to the cause be moot, and as to the other parties would be in effect a decree to quiet title as

against the United States in a case to which it was not a party and where it could not be made a party.

3. *The causes need not be reversed to prevent a res judicata.*

These cases were dismissed in the court below because the court could not in suits against these defendants as individuals take judicial cognizance of the issues raised.

The cause of action asserted between complainants and the defendants Burleson and Carlton can not again arise. The decree could not be *res judicata* in any subsequent suit because of the nature of the case and decision.

It is wholly unlike in principle the question presented in *United States* v. *Hamburg American Co.*, 239 U. S. 466, and the other cases cited as following this case.

If it can be conceived that a like case could arise the decree entered in these cases could not be pleaded as *res judicata*.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 815.

THE COMMERCIAL CABLE COMPANY, APPELLANT,

vs.

ALBERT S. BURLESON AND NEWCOMB CARLTON.

No. 816.

COMMERCIAL PACIFIC CABLE COMPANY,
APPELLANT,

vs.

ALBERT S. BURLESON AND NEWCOMB CARLTON.

Memorandum for Appellants in Reply.

We believe that our main brief deals with all the points argued by the Government, and we desire to add only a few observations in reply.

(1) The case of *Martin vs. Mott*, 12 Wheat., 19, relied upon by the Government, presents no analogy to the case at bar. That decision concerned the power to call out the militia to "suppress insurrections and repeal invasions." It

related to the enforcement of the duty laid upon all members of the militia. That duty was created when the militia was defined and organized. It was of the essence of that duty to respond to military order. The authority to give the military order was appropriately lodged with the Commander-in-Chief. The case is one in which the soldier sought to contest the summons to military service. Obviously, we should say, the requirement of the service of the militia—when it should be performed—may present a political question, as distinguished from a judicial question, without involving in any way the conclusion that the courts are without authority to protect the property of a civilian from being arbitrarily taken.

Nor was there anything in that case to show either a mistake of law or an arbitrary assertion of power. That decision does not require the conclusion that even as to calling out the militia there would be no protection if the Executive, in some mistaken view of his authority, should assume to exert the power when manifestly there was no question of the execution of the law and neither insurrection nor invasion. But there is no occasion to discuss such a question here.

In the present case we are not dealing with the soldier, but with the civilian. We are in the domain of civil rights. These continue to exist, albeit there is a state of war. Otherwise, martial law might be declared wholly outside the theater of war and throughout the length and breadth of the land. (See *Ex parte Milligan*, 4 Wall., 2.)

We are dealing with the seizure of private property, and the question of its legality is necessarily one to be determined according to the law governing private property. It is of the essence of the right of private property under the law, that it shall not be taken arbitrarily. Whether or not it has been so taken, either under a misconception of authority, or without proper regard for the limitations of authority, is not a political question but is necessarily a judicial question.

Where the power of eminent domain is sought to be exercised, the validity of the taking presents a judicial question. Thus it is a familiar principle that the question whether the use is, or is not, a public use, is a judicial question. It is only when the legislature itself passes upon the necessity that this question is deemed to be foreclosed, and this is manifestly because of the application of the principle with respect to the exercise of legislative discretion in the discharge of the legislative function. Even in such a case, this court has taken pains to point out, as in the *Chandler-Dunbar* case (230 U. S., 53, 66), that the extent of the taking was not in fact arbitrary.

But in the present case, Congress has not exercised its judgment, and it could not delegate a limitless or arbitrary power.

There is no reason, so far as justiciability is concerned, why a different ruling should be applied than that in the *McAnnulty* case (187 U. S., 94). The matter in question here is no more political in its essential character than the question with respect to the use of the mails which was there under consideration.

It should also be remarked that the statement quoted by the Government from Justice Story (in *Martin vs. Mott*) that "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts" the statute "constitutes him the sole and exclusive judge of the existence of those facts," cannot have the sweeping effect for which the Government contends without doing violence to principles well established in the decisions of this court.

It was the contention of the Postmaster General in the *McAnnulty* case, that he was the sole judge of the fraud alleged to have been committed in the use of the mails and he recited, in the terms of the statute, that he was satisfied with the evidence. But this was of no avail when it appeared in the admitted facts that he had no right to be satisfied and

that his action was arbitrary and proceeded from a misconstruction of his authority. Similarly, despite the wide and necessary authority of the Interstate Commerce Commission, it cannot act without evidence. Even in the case of the immigration laws, there are restrictions which must be observed. (See *Japanese Immigrant* case, 189 U. S., 86, 100, 101; *Tang Tun vs. Edsell,* 223 U. S., 673, 675; *Lewis vs. Frick,* 233 U. S., 291, 297; *Gegiow vs. Uhl,* 239 U. S., 3, 9.)

The permitted discretion stops short of the exercise of arbitrary power, and Mr. Judge Story's statement must be taken with this qualification. The discretion to make a finding has a limitation that the finding must have some basis in facts. The situation justifying the exercise of power is not to be created by administrative fiat.

We quote again the words of Mr. Justice Lamar, speaking for this court, in the case of *Interstate Commerce Commission vs. Louisville & Nashville Railroad,* 227 U. S., 88, 91.

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal, under our Government."

The Solicitor-General points to a series of acts passed in connection with the War, committing matters to the discretion of the President. A considerable number relate to the mere establishment of regulations, obviously appropriate in the circumstances described. In other cases, opportunity is given for agreement which has frequently forestalled the necessity for Executive action.

But the tendency to vest administrative powers in the President does not make for the conclusion that this is an avenue of escape from all restrictions, and that the delegation is a permitted vehicle of arbitrary power. Rather, with full recognition of the scope of a needed discretion, the essential limit for the protection of the citizen in his civil right of property should be clearly maintained. Cases of the exer-

cise of arbitrary power, or of a mistake of law with respect to the authority conferred, are, happily, not numerous. But when they arise, the question must be recognized as not being merely a political one. Perhaps in nearly every instance arising under the various acts to which the Government refers, there was a proper basis of fact for the exercise of discretion. Unless we have a state of martial law throughout this county governing all civilians, the citizen has a right to resort to the civil courts to protect his property from being arbitrarily seized.

(2.) In discussing the provision for compensation, the Government quotes text writers (Govt. Brief, pp. 40, 41) to support its statement that the public faith is sufficient security for payment. The first quotation is from Cooley's Constitutional Limitations (6th ed., 69, p. 692). It does not, as we read it, support the argument. Immediately following the portion of the text quoted by the Government, we find this sentence:

> "The decisions upon this point assume that when the State has provided a remedy, by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction, since the property of the municipality, or of the State, is a fund to which he can resort without risk of loss."

Chapman vs. Gates (54 N. Y., 132) is one of the cases cited in the note to the text and there, as pointed out in our main brief (pp. 84, 85), the court quoted the statement of Chief Justice Nelson in *People vs. Hayden* (6 Hill, 359) to the effect that, even as respects the State itself, there must be certain and ample provision so that the owner can coerce payment through judicial tribunals, or otherwise, without any unreasonable or unnecessary delay. And, in the other cases cited in the foot-note, payment was provided for out of the public treasury on the warrant of the appropriate officer.

The Government then quotes a statement from 10 Ruling Case Law, Sec. 110 (Govt. Brief, pp. 40, 41), but for the

statement in the text there is no support for the authority cited by the text writer. The first of these authorities is from the decision of this court in *Sweet vs. Rechel* (159 U. S., 380), where this court sustained the provision for compensation because the owner had an *"unqualified right to a judgment for the amount of such damages, which can be enforced, that is, collected, by judicial process."* In another of the cases cited (*Haverhill Bridge vs. Essex* Company, 103 Mass., 120), it was said that if the statute only gave a right of action against towns, with no process pointed out by which the right may be enforced without unreasonable delay, there would be force in the objection on constitutional grounds. And in the third case cited to support the text-writer's statement (*Powers vs. Bears*, 12 Wis., 236), the law under review was not sustained.

The authorities, as pointed out in our main brief, do not sustain the Government's contention.

Respectfully submitted,

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